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Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL., PETITIONERS,

vs.

CALVERT DISTILLERS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1950.

CERTIORARI GRANTED FEBRUARY 26, 1951.

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UNITED STATES OF AMERICA.

DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA.

No. 2607 Civil Action.

CALVERT DISTILLERS CORPORATION,

versus

SCHWEGMANN BROTHERS, ET AL.

Appearances:

Messrs. Wisdom & Stone, John Minor Wisdom, Esq., Saul Stone, Esq., Paul O. H. Pigman, Esq., Attorneys for Defendant-Appellant.

Messrs. Monroe & Lemann, Walter J. Suthon, Jr., Esq., Robert G. Polack, Esq., Attorneys for Plaintiff-Appellee.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 17th day of January, 1950, at the City of New Orleans, Louisiana.

Extension of time granted by the Honorable United States District Court, Eastern District of Louisiana, bringing the return day up to and including April 4th, 1950.

BILL OF COMPLAINT.

Filed Nov. 25, 1949.

(Number and Title Omitted.)

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:

Calvert Distillers Corporation, a corporation organized and established under the laws of the State of Maryland, brings this bill of complaint against Schwegmann Brothers, a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, and said John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, individually, all of the full age of majority and domiciled in the City of New Orleans, State of Louisiana, and for cause of action plaintiff avers that:

I.

Plaintiff now is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Maryland, and a citizen and resident of that State, having its domicile and principal place of business at Relay, in the State of Maryland.

II.

Defendant, Schwegmann Brothers, is, and at all times hereinafter mentioned was, a commercial partnership doing business in the City of New Orleans, State of Louisiana, and a citizen and resident of that State, composed of defendants, John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, all of whom are citizens and residents

of that State, having their domicile and principal place of business in the City of New Orleans, Parish of Orleans, State of Louisiana, and within the Eastern District of Louisiana, in which place and in which district among others the acts herein complained of have been done by said defendants.

III.

The jurisdiction of this Court is based on diversity of citizenship, the matter in dispute and the amount in controversy, exclusive of interest and costs, being in excess of Three Thousand Dollars ($3,000.00), and the object of this suit is to obtain an abatement of defendants' acts herein complained of and to enjoin and restrain recurring and continuing trespasses by defendants upon plaintiff's rights of property, its business, good will, trade marks, names, brands and labels identifying its commodities, which are all of a value and amount largely in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

IV.

Plaintiff, Calvert Distillers Corporation, is a wholly owned subsidiary of The Calvert Distilling Company, also a Maryland corporation, which parent company manufactures "Lord Calvert", "Calvert Reserve", and "Calvert Special" blended whiskies, and "Calvert Distilled London Dry Gin", and owns the trade mark, "Calvert", which trade mark or trade name is registered in the United States Patent Office in the name of said The Calvert Distilling Company.

Plaintiff, Calvert Distillers Corporation, is the exclusive distributor for the State of Louisiana of the brands of

whiskey and gin aforesaid, and also "Carstairs White Seal" blended whiskey, manufactured by an affiliate, Carstairs Bros. Distilling Co., Inc., a Maryland corporation, which owns the trade name, "Carstairs".

Plaintiff, Calvert Distillers Corporation, has been specifically authorized by each and all of said producers and owners of the aforesaid trade names and brands to establish and enforce minimum resale and retail prices in Louisiana under the Louisiana Fair Trade law of the above-mentioned trade-marked and named beverages.

Said beverage products are sold in Louisiana only to wholesalers who in turn sell them to retailers for resale to the consuming public. All such products purchased from plaintiff for resale in Louisiana are purchased from and sold by plaintiff in interstate commerce, shipments being made from and title passing at a point outside of the State of Louisiana. All orders for merchandise by its Louisiana customers are subject to acceptance by plaintiff's executive office in New York.

V.

Plaintiff for several years past has sold or distributed, and now sells and distributes, within the State of Louisiana, the aforesaid whiskies and liquors which bear, or the labels or contents of which bear, the aforesaid trade marks, brands or names. Said products or commodities have been and are in fair and open competition with products or commodities of the same general class produced by others. The products or commodities distributed by plaintiff, and bearing its aforesaid trade mark, brands or names, are, and for several years past have been, sold at retail through liquor stores and other establishments

dealing in liquors throughout the State of Louisiana, and elsewhere in the United States.

VI.

By advertising and otherwise, "Calvert" products, identified as aforesaid, for several years past have been and now are well recognized and established commodities, both nationally and in the State of Louisiana, and "Calvert" products, so identified, now enjoy, and for several years past have enjoyed, a good reputation among dealers, retailers and consumers. Plaintiff has established a valuable good will and has expended large sums of money in the creation and development thereof, and at all times has endeavored to so market its commodities or products that they should be offered for sale within the State of Louisiana at reasonable prices, and to induce retailers to handle its products or commodities, plaintiff has endeavored to create a public demand for its products or commodities at prices which will yield a fair profit to retailers handling them.

VII.

Several years ago there developed in the liquor trade a practice of cutting prices on advertised products or commodities well known to the public and sold under distinctive trade marks, brands and names. Such products were offered by retail dealers at prices conspicuously lower than the marked or established prices of said products or commodities, as so-called "leaders" for the purpose of creating the impression that their goods, of which the prices were not well known, were sold at corresponding reductions and that all articles dealt in by a particular retail dealer engaged in price cutting were sold by him at less than

they could be obtained elsewhere, and for the purpose of attracting customers to such stores and away from other stores. The stores at which such practices were prevalent became known as "cut rate stores". Such practice of cutting well known and established prices engendered a condition by which other retail dealers were forced to meet the cut prices advertised by their competitors. One cut produced another in retaliation, so that ultimately in a particular community well known articles identified by trade marks, brands and names with established prices were offered at prices cut to a point which yielded no profit, and in many instances represented actual loss. Said price cutting resulted in the destruction of all incentive on the part of dealers to sell such commodities and in their consequent refusal to handle or to stock the same. As a further result of said price cutting, the producer or owner of such identified articles whose goods had been handled in this manner through no fault of his own, was deprived of a market and facilities for distribution and his business and good will seriously interfered with, and in many instances destroyed.

VIII.

The situation above set forth was particularly true in the State of Louisiana, especially with respect to whiskies and liquors, and had extended to other lines of merchandise. To remedy this evil and to safeguard the public against the creation and perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices under which fair and honest competition is destroyed or prevented, the legislature of Louisiana passed Act No. 13 of 1936, known as the "Louisiana Fair Trade Act". And, by amendment to the Sherman Anti-Trust Act, August 17, 1937, c. 690, Title VIII S 1, 50 Stat. (U. S. C. A. Title 15, S 1, Act 1937), it was provided:

"Provided, that nothing herein contained shall render illegal, contracts or agreements, prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title, as amended and supplemented; Provided, further, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other."

IX.

Pursuant to the public policy of the State of Louisiana, evidenced by the said "Louisiana Fair Trade Act" and to the provisions thereof, and in order to protect itself, together with wholesalers, retailers and the consuming public against the injurious and uneconomic practices recognized by the said "Louisiana Fair Trade Act", and particularly against the price cutting hereinabove set forth, plaintiff adopted a system of doing business which consisted of entering into a standard form of contract with

retail dealers in the State of Louisiana, involving and concerning plaintiff's products and commodities, bearing plaintiff's distinctive trade marks, brands, names and labels, and obligated said dealers to sell plaintiff's said products and commodities only to consumers at specified prices. Plaintiff annexes hereto as part hereof said standard form of contract, marked Exhibit "A", being a true and correct copy of the form of contract above referred to. On or about April 1, 1948, plaintiff entered into signed contracts with more than one hundred retail liquor dealers operating stores in the State of Louisiana, including some in the City of New Orleans, on said form of contract marked Exhibit "A". Plaintiff, in addition, on or about November 12, 1949, entered into signed contracts with five retail liquor dealers operating stores in the State of Louisiana, including some in the City of New Orleans, on said form of contract marked Exhibit "A". On or about November 14, 1949, plaintiff sent or caused to be sent, through its New York office and Gulf States Beverage Journal of Coral Gables, Florida, by first-class United States mail with sufficient postage attached for their transmission to all of the retail liquor dealers throughout the State of Louisiana, including the defendants herein and other dealers in New Orleans, Louisiana, a letter in which was enclosed a schedule of its current minimum prices of products distributed by it in Louisiana. Said letter called attention to the fact that a number of fair trade contracts were then in effect in Louisiana which made the resale prices shown on the enclosed list binding on the other retailers regardless of whether they had signed the contract with plaintiff or not. Plaintiff annexes hereto as part hereof a copy of said letter of November 14, 1949, and its said schedule of prices which accompanied said letter, which are clipped together and marked Exhibit "B".

X.

Plaintiff is informed and believes, and so believing, avers that notwithstanding the existence of its fair trade agreements with authorized retail liquor dealers in the State of Louisiana, and full knowledge thereof by the defendants, defendants have sold at retail to the consuming public, and continue to so sell, the commodities or products bearing the trade marks, names, brands and labels of plaintiff at prices below the minimum retail prices set forth in Exhibit "B". Defendants have, therefore, violated said "Louisiana Fair Trade Act" (Act No. 13 of the Louisiana Legislature of 1936), defendants having actual notice and knowledge of the existence of numerous such contracts between plaintiff and other Louisiana retail liquor dealers who observe said minimum retail resale schedules and who distribute plaintiff's products and commodities identified as aforesaid. Defendants have also had actual notice and knowledge of the minimum retail resale price of plaintiff's products specified in the attached documents marked Exhibit "A" and Exhibit "B", which have been and are now in force.

XI.

Subsequent to the aforesaid notices and prior to the commencement of this action, defendants, as plaintiff is informed and believes and so believing avers, with full knowledge of the existence of plaintiff's contracts, and of plaintiff's minimum retail resale price schedule, and with the purpose and intention of interfering with and destroying the effects thereof, and in violation of the provisions of the "Louisiana Fair Trade Act", have knowingly and wilfully offered for sale and sold at retail, and are now so doing, certain of the products and commodities of plain-

tiff bearing the name, trade marks, labels, brands of plaintiff and mentioned and described in the exhibits hereto annexed, particularly the whiskey distributed by plaintiff and known as "Calvert Reserve", at less than the minimum retail price stipulated in the contract and price list hereto annexed, and marked Exhibit "A" and Exhibit "B". Defendants have always had an opportunity to purchase said products on the same terms and conditions as other retailers and dealers. Plaintiff, on information and belief, avers the following specific instances of such conduct on the part of defendants:

(1) Defendants did, on or about 10:45 o'clock A. M., Friday, November 18, 1949, sell a bottle of "Calvert Reserve" whiskey, containing one-fifth of a gallon, at the cut price of $3.25, plus sales tax of 10¢, or a total price of $3.35, when the price of said one-fifth of a gallon of "Calvert Reserve" whiskey established in the fair trade agreements between plaintiff and other Louisiana retail liquor dealers was $4.24, plus sales tax of 13¢, or a total of $4.37.

(2) Defendants did, on or about 10:55 o'clock A. M., Friday, November 18, 1949, sell a bottle of "Calvert Reserve" whiskey, containing one-fifth of a gallon, at the cut price of $3.25, plus sales tax of 10¢, or a total price of $3.35, when the price of said one-fifth of a gallon of "Calvert Reserve" whiskey established in the fair trade agreements between plaintiff and other Louisiana retail liquor dealers was $4.24, plus sales tax of 13¢, or a total of $4.37.

XII.

Said wilful acts of the defendants are contrary to the provisions and spirit of the "Louisiana Fair Trade Act",

and constitute unfair competition as to plaintiff, and all retail liquor dealers within the State of Louisiana, including those under contract with plaintiff. Said wilful acts of defendants have induced, coerced and forced other retail liquor dealers under contract with plaintiff to violate their contracts with plaintiff. In addition thereto, a further consequence of defendants' aforesaid wilful acts is that the buying public, including customers of all retail liquor dealers in the State of Louisiana, are misled and induced thereby to believe that plaintiff's products or commodities sold by defendants are not worth the prices at which they are nationally advertised and sold, pursuant to plaintiff's minimum retail resale price schedules. Retailers other than the defendants cannot profitably market plaintiff's commodities or products at the prices at which said products or commodities are advertised and sold by defendants. A continuation of such acts by defendants will produce great and irreparable injury to plaintiff. It is impossible to ascertain the pecuniary loss which plaintiff has already suffered, and will suffer if the practices of defendants are permitted to continue. A continuance of such acts by defendants tends to result in irreparable loss of sales to plaintiff and the destruction of plaintiff's business and the good will pertaining thereto. Pecuniary compensation would not afford adequate relief to plaintiff, and it is necessary that defendants be restrained from continuing their wilful acts in derogation and violation of said "Louisiana Fair Trade Act" and of the rights of plaintiff thereunder as aforesaid, to prevent a multiplicity of suits. The wrongs complained of as above set forth imminently imperil and immediately threaten devastation of plaintiff's business, and destruction of plaintiff's good will, and multiple breaches, violations and cancellations of its said contracts with other retail liquor dealers throughout the State of Louisiana, and plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays that, after due hearing and upon presentation to the Court by plaintiff of such bond as the Court may require and approve, the Court grant a preliminary writ of injunction enjoining defendants, Schwegmann Brothers, a commercial partnership, and John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, the individuals composing said partnership, their officers, agents, servants and employees, and all persons acting in aid or in conjunction with them or any of them, pending final hearing or sooner determination of this cause, from in any manner or by any means, direct or indirect, advertising for sale, selling, or offering for sale, any of the products or commodities of plaintiff, Calvert Distillers Corporation, bearing the names, trade marks, labels or brands of plaintiff, which said defendant, Schwegmann Brothers, now has or which it may hereafter acquire, and mentioned and described in the contract, forms and schedules annexed and attached hereto, and marked Exhibit "A" and Exhibit "B", at prices less than those set opposite each of said products in said schedules as mentioned and described therein, or at prices less than those which may be shown in any future minimum retail prices schedules hereafter issued by plaintiff in connection with its contracts with other dealers; and from making any rebates, refunds, discounts or concessions of any kind or character for the purpose of or which will result in decreasing the said stipulated resale scheduled prices, except that in case defendants are (a) closing out their stock for the purpose of discontinuing delivering any such commodity, or (b) when the goods are damaged or deteriorated in quality and notice is given to the public thereof, or (c) when the sale is by an officer acting under the orders of any Court; and that upon final hearing, said injunction be made permanent and perpetual.

Plaintiff further prays for such other, further and different relief of any and every sort as to this Court may seem just, equitable and proper in the premises, together with costs and disbursements of this suit.

(S.) MONROE & LEMANN,
(S.) WALTER J. SUTHON, JR.,
(S.) ROBERT G. POLACK,
Solicitors for Plaintiff.

1424 Whitney Building,
New Orleans, Louisiana.

State of Louisiana,
Parish of Orleans.

Robert G. Polack, being duly sworn, deposes and says:

That he is an attorney at law and one of the solicitors for the plaintiff herein; that he has read the foregoing bill of complaint, and knows the contents thereof; that plaintiff is a foreign corporation and that none of its officers are within the State of Louisiana; that all of the allegations of fact contained in said bill of complaint are true and correct to the best of affiant's knowledge, information and belief; and that as to such matters as are stated on information and belief, affiant believes them to be true.

(S.) ROBERT G. POLACK.

Sworn to and subscribed before me at New Orleans, Louisiana, this 23 day of November, 1949.

WATTS K. LEVERICH,
Notary Public.

EXHIBIT "A".

Calvert Distillers Corporation.

This Agreement, made this ..... day of ....., 194..., between Calvert Distillers Corporation, a corporation with an office and place of business at 405 Lexington Avenue, New York City, N. Y. (hereinafter called "Distributor"), and ....., of ..... Louisiana (hereinafter called "Retailer"),

Witnesseth:

Whereas, Distributor is engaged in the business of distributing certain alcoholic beverages which are owned by Distributor and the labels or containers of which bear the trade-marks, brands and/or name of Distributor, or the trade-marks, brands and/or name of the producer thereof, and

Whereas, in each case in which Distributor does not own any trade-mark, brand or name used in connection with any such beverage, Distributor has been specifically authorized by the producer owning such trade-mark, brand or name to establish a minimum resale price for such beverage pursuant to the provisions of the Fair Trade Act of the State of Louisiana, and

Whereas, said beverages are in fair and open competition with commodities of the same general class produced or distributed by others, and

Whereas, Distributor and Retailer desire to avail themselves and the public of the benefits of the said Fair Trade Act, and to avoid having such trade-mark and branded

articles made the subject of injurious and uneconomic practices, and to avoid the depreciation of or damage to said trade-marks, brands or names through such practice,

Now Therefore, the parties hereto agree as follows:

First: Retailer will not sell, advertise, or offer for sale within the State of Louisiana any alcoholic beverage which Retailer has purchased, or now has on hand, or may hereafter purchase, and which (a) bears the trade-mark, brand or name of Distributor, or (b) is distributed by Distributor and bears the trade-mark, brand or name of the producer of such beverage, at less than the minimum price for such beverage stipulated from time to time by Distributor. Retailer further agrees that he will not offer or give any article of value in connection with the sale of such beverage, or sell or offer for sale any such beverage in combination with any other commodity, or make any refunds, discounts or concessions of any kind, whether by the giving of coupons or otherwise, for the purpose of, or which will result in evading the minimum price restrictions imposed under this contract.

Second: In the event (a) of closing out of Retailer's stock for the purpose of discontinuing dealing in any alcoholic beverage to which this contract is applicable, or (b) that any such beverage in Retailer's hands is damaged, defaced, or deteriorated in quality, or (c) that Retailer has on hand any of said beverages after this agreement has been terminated or canceled for any reason, Retailer, before offering the beverage or beverages in question for sale at a price or prices less than the minimum prices fixed therefore pursuant to this contract, shall first give Distributor reasonable notice in writing and an opportunity to purchase such beverage or beverages at the original in-

voice price at which Retail purchased such beverage or beverages.

Third: The minimum prices of said beverages in sales by Retailer to consumers shall be in accordance with written schedules furnished from time to time by Distributor to Retailer, which schedules shall constitute a part of this contract. Distributor reserves the right at any time, and from time to time, by giving written notice to Retailer, to change the minimum prices specified in said schedules, to eliminate one or more beverages from the operation of this contract, and (subject to the provisions of the said Fair Trade Act) to extend the operation of this contract to one or more additional beverages. Said notice may be given by delivering the same to Retailer in person, or to any employee of Retailer at Retailer's principal place of business, or by mailing the same by registered or ordinary mail addressed to Retailer at Retailer's place of business, and shall be effective upon he expiration of five (5) days after the delivery or mailing thereof, as the case may be, Sundays and holidays included. The schedule which shall have last become effective shall govern the minimum prices for said beverages at the time each particular sale, advertisement, or offer of sale is made.

Fourth: Inasmuch as it would be impracticable or extremely difficult to fix the damage which may be sustained by Distributor by reason of a breach of this contract by Retailer, it is agreed that the Retailer shall pay to Distributor, as liquidated damages, the sum of Fifty ($50) Dollars for each breach of this contract. It is further agreed that Distributor, in addition to all other legal rights and remedies, shall be entitled to injunctive relief against any and all breaches of this agreement by Retailer.

Fifth: This contract shall expire in one year from the date hereof, but shall be renewed from year to year unless at each termination date the parties hereto indicate in writing their desire not to have the contract renewed. Distributor reserves the right to cancel this agreement on twenty-four hours written notice to Retailer, which may be given in the manner prescribed in paragraph "Third". Neither termination nor cancellation shall affect any right which shall have accrued to either of the parties hereto under this contract or the said Fair Trade Act prior to such termination or cancellation, or affect the application to Retailer of the provisions of the said Fair Trade Act relating to non-contracting parties.

This contract supersedes any previous contracts, based on the said Fair Trade Act of Louisiana between the parties hereto.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

CALVERT DISTILLERS CORPORATION,
Distributor.

By .....
.....

Retailer.

By .....

State of Louisiana,
Parish of Orleans.

Henry W. McGuire, being duly sworn, deposes and says:

That he resides in the City of New Orleans; that Calvert Distillers Corporation did, on or about April 1, 1948, enter

into signed contracts with more than one hundred retail liquor dealers operating stores in the State of Louisiana on the printed form of retail fair trade sales agreement, a true and correct copy of which form is attached to the bill of complaint in this case marked Exhibit "A", and providing for the maintenance of minimum retail price schedules; that Calvert Distillers Corporation has, on or about November 12, 1949, entered into signed contracts with five retail liquor dealers operating stores in the State of Louisiana on the printed form of retail fair trade sales agreement, a true and correct copy of which form is attached to the bill of complaint in this case and marked Exhibit "A", and providing for the maintenance of minimum retail price schedules; that he caused to be mailed through the New York office of Calvert Distillers Corporation and Gulf States Beverage Journal of Coral Gables, Florida, by United States mail, postage prepaid, on or about November 14, 1949, a copy of the notice of the minimum retail price schedules on products of Calvert Distillers Corporation, identical with the form attached to the bill of complaint in this case, and marked Exhibit "B"; that a copy of said notice was addressed and mailed to Schwegmann Brothers Super Market at 2222 St. Claude Avenue, New Orleans, Louisiana; that when Calvert Distillers Corporation caused to be mailed a copy of said Exhibit "B" to Schwegmann Brothers Super Market, it also caused copies thereof to be mailed simultaneously to all other retail liquor establishments in Louisiana.

(Sgd.) HENRY W. McGUIRE.

Sworn to and subscribed before me at New Orleans, Louisiana, this 23rd day of November, 1949.

(Sgd.) ROBERT G. POLACK,
Notary Public.

ANSWER TO COMPLAINT.

Filed Dec. 12, 1949.

(Number & Title Omitted.)

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:

First Defense.

The complaint fails to state a claim upon which relief can be granted. The plaintiff's course of conduct in using contracts with certain Louisiana retailers as a basis for fixing the prices of non-contracting Louisiana retailers violates the Sherman Anti-Trust Act, as amended by the Miller-Tydings Act Defendants' course of conduct in attempting to fix resale prices of non-contracting retailers in Louisiana is an integral part of an integrated price-fixing scheme of transactions affecting interstate commerce dependent for its success upon activity which affects interstate commerce.

Second Defense.

The complaint fails to state a claim upon which relief can be granted, for the following reasons:

(1) The contracts executed on or about April 1, 1948 expired one year from the date of execution. Such contracts could not be renewed under the renewal clause, because of Regulation 8 of the Louisiana Board of Alcoholic Beverage Control. Regulation 8 (effective November 9, 1948; rescinded, effective November 12, 1949) prohibits

the execution of fair trade contracts "affecting the prices of liquor in the State of Louisiana". A copy of Regulation 8 and a copy of the Board's order rescinding the regulation are attached hereto, as Defendants' Exhibits "A" and "B".

(2) The defendants' sales complained of in this action were of merchandise purchased prior to receipt of notice of the contracts referred to as executed "on or about November 12, 1949".

Third Defense.

The complainant fails to state a claim upon which relief can be granted, for the following reasons:

(1) Implicit in Act 13 of 1936 is the mandate that a producer, distributor, or wholesaler availing itself of this extraordinary statute must maintain a uniform price policy. Plaintiff has not maintained a uniform price policy. In the enforcement of its prices, plaintiff winks at price-cutting of certain dealers, especially those who cooperated with plaintiff in sponsoring and defending the price-fixing features of Act 360 of 1948. Plaintiff discriminates against other dealers, and particularly against defendants who attacked the price-fixing features of Act 360 of 1948.

(2) Plaintiff comes into Court, seeking equitable relief, with unclean hands in that it has enforced its resale prices in an arbitrary and discriminatory manner.

Fourth Defense.

The complaint fails to state a claim upon which relief can be granted. The acknowledged basis for holding non-

contracting parties to prices fixed in a so-called fair trade contract is to protect the good will incident to ownership of a trade-mark. The contracts upon which plaintiff relies in this action were not entered into by the producer or by the owner of the trade-mark in question, but by a distributor, a separate corporate entity having no ownership of the trade-mark. The contracts relied upon here do not, therefore, come within the contemplated scope of Act 13 of 1936 or of the Miller-Tydings Amendment to the Sherman Anti-Trust Act.

I.

Defendants, for lack of information, deny the allegations in Paragraph I of the complaint and call for strict proof, including proof of the fact that complainant is qualified to do business in the State of Louisiana.

II.

Defendants admit the allegations in Paragraph II of the complaint, but deny that the acts complained of are in violation of existing law.

III.

Defendants deny that this Court has jurisdiction based on diversity of citizenship. On the contrary, defendants aver that indispensable party plaintiffs in this suit are Louisiana citizens. The validity of the contracts relied upon here is at issue; all the contracting parties are therefore indispensable parties.

IV.

Defendants deny the allegations of Paragraph IV of the complaint, for lack of information, except that they admit

that all of the products mentioned therein that are purchased from plaintiff for resale in Louisiana are purchased from and sold by plaintiff in interstate commerce.

V.

Defendants deny, for lack of information, the allegations in Paragraph V of the complaint and call for strict proof of the fact that the products and commodities therein mentioned are in fair and open competition with products and commodities of the same general class produced by others.

VI.

The allegations of Paragraph VI require no admission or denial by defendants.

VII.

Defendants deny the allegations in Paragraph VII of the complaint, especially insofar as Louisiana is concerned.

VIII.

Defendants deny the allegations in Paragraph VIII of the complaint, insofar as Louisiana is concerned, except they admit that the laws referred to were enacted.

IX.

Defendants deny the allegations in Paragraph IX that the Louisiana Fair Trade Law was enacted to protect the consuming public against injurious and uneconomic practices. On the contrary, defendants avers that the so-called

Fair Trade Law was pressured through the legislature by a few well-organized pressure groups of wholesalers and retailers for their own advantage; solely for the profit of inefficient and marginal merchants who could not survive in a competitive market, to the detriment of the public and of the efficient merchant who could prosper in a free and competitive market.

Defendants deny the validity of the contracts mentioned in Paragraph IX of the complaint. Defendants admit the receipt of the letter from plaintiff's New York office, dated November 14.

X.

Defendants deny the allegations of Paragraph X of the complaint, and particularly that they violated any existing law.

XI.

Defendants deny the allegations of Paragraph XI except with respect to the product known as Calvert Reserve, which it admits it sold at the prices set forth in subparagraphs 1, 2, 3, and 4 of Paragraph IX of the complaint.

XII.

Defendants deny the statement made in Paragraph XII, particularly that defendants' acts have induced and forced other retail liquor dealers under contract with plaintiff to violate their contracts with plaintiff.

Defendants deny that the buying public is misled by virtue of reduced prices and allege on the contrary that

such reduced prices benefit the public. Defendants deny that retailers cannot profitably market plaintiff's commodities except at the price fixed by plaintiff. Defendants deny that the sale of plaintiff's product at a price below the established price will cause a destruction of plaintiff's business, and defendants deny that plaintiff is entitled to injunctive relief.

Wherefore, defendants pray that the complaint herein be dismissed at plaintiff's cost.

WISDOM AND STONE,
JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendants.
By SAUL STONE.

312 Whitney Building,
New Orleans, Louisiana.

MOTION TO DISMISS.

Filed Dec. 13, 1949.

(Number & Title Omitted.)

To the Honorable The United States District Court for the Eastern District of Louisiana, New Orleans Division:

The defendant moves the Court to dismiss the complaint for the following reasons:

1. The complaint fails to state a claim against defendant upon which relief can be granted. The contracts relied upon by plaintiff are null and void under the law of

Louisiana in that the contracts lack mutuality for the reason that the plaintiff has incurred no obligation thereunder. In the alternative, if an obligation on the part of the plaintiff inferentially exists, such obligation is subject to purely potestative conditions.

2. Plaintiff has failed to join indispensable parties. Plaintiff predicates its complaint on contracts, the validity of which are at issue. The contracting dealers are therefore indispensable parties to the action.

WISDOM AND STONE,
JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendants,
By JOHN MINOR WISDOM.

312 Whitney Building,
New Orleans, Louisiaan.

United States District Court, Eastern District Of Louisiana.

Calvert Distillers Corporation,

Vs. No. 2607, C. A.

Schwegmann Brothers, Et Al.,

Proceedings had in open Court before Honorable J. Skelly Wright, Judge, United States District Court for the Eastern District of Louisiana, in the above

entitled and numbered cause, on December 13, 1949, at New Orleans, Louisiana.

Appearances:

Messrs. Wisdom & Stone, (John Minor Wisdom, Saul Stone, Esqs.) Attorneys for Plaintiff.

Messrs. Monroe & Lemann, (Walter J. Suthon, Jr., and Robert G. Polack, Esqs.) Attorneys for Plaintiff.

ANTHONY BOLOGNA, witness, being duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Your name is Anthony Bologna?

A. Yes, sir.

Q. What is your business?

A. Wholesale liquor dealer.

Q. Where are you located?

A. 514 North Claiborne Avenue.

Q. In New Orleans?

A. In New Orleans, yes.

Q. Are you now a wholesaler for Calvert?

A. No, sir.

Q. Were you ever a wholesaler for Calvert Distillers Corporation, Mr. Bologna?

A. For twelve years.

Q. When was your relationship with Calvert terminated?

A. I would say about three months ago.

Q. You were a wholesale distributor for twelve years prior to three months ago?

A. Right.

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By Mr. Stone:

Q. Prior to the effective date of Act 360 you were the only Calvert distributor in this area?

A. That is not correct.

Q. Who else were distributors?

A. McKesson & Robbins, Inc.

Q. You were both handling Calvert at that time?

A. Correct.

Q. From whom did you purchase the Calvert that you sold to the retailers?

A. From Calvert Distillers.

Q. Did you as a wholesaler enter into any fair trade contracts with retailers with respect to Calvert?

A. As a whoelsaler I didn't enter into any.

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The Court:

What is the effective date of Act 360?

July 28, 1948.

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Q. Are you familiar with the general policy of Calvert that prevailed in New Orleans with respect to resale price maintenance prior to Act 360 and after April 1, 1948?

Mr. Suthon:

That calls for the opinion of the witness, or a conclusion of the witness rather than any facts.

The Court:

Overruled. Let him testify whether or not he is familiar.

A. If my memory serves me right, I don't recall a contract from the wholesaler to the retailer, but I think there was a contract from the distillers to the retailers.

By Mr. Stone:

Q. Didn't you tell me when I talked to you on the telephone yesterday that you did not know of any fair trade contracts in effect with respect to Calvert before Act 360?

A. I told you I didn't know whether there were or not, but I would look it over and see whether there was. I do recall there was a contract from the distiller to the retailer, but I don't recall any contract from the wholesaler to the retailer. I don't recall whether the wholesaler to the retailer, or the distiller to the retailer.

Q. Has there ever been any contract from the wholesaler to the retailer in whiskey maintenance prices—

A. I don't know. You mean between the retailer and the wholesaler?

A. Yes.

A. I don't know if any.

Q. Are you familiar with the prices that prevailed on Calvert between April, 1948 and July, 1948, when Act 360 became effective?

A. What do you mean, was I familiar?

Q. Do you know what the retail prices that Calvert had to be sold for under the fair deal contracts between April 1, 1948 and July, 1948 when Act 360 became effective?

A. I believe it was $4.24.

Q. And at that time when you were selling Calvert to the retailers you were giving what the trade commonly called "deals"?

A. During what period?

Q. The three months before Act 360 went into effect.

A. Yes, we had deals.

Q. Will you explain to the Court what deals mean in the whiskey trade?

A. Quantity deals, buy twenty cases and get a discount of $2.00 or $3.00, whatever it may be, per case.

Q. When you sold those deals prior to Act 360, wouldn't that mean that the retailer would necessarily sell, or be in position to sell his products cheaper?

Objection: Mr. Suthon:

We object. There is no relevancy, and calling for the conclusion of the witness.

(Colloquy).

The Court:

I do not follow the testimony that this man was in any contract with Calvert, nothing established to show there was a contract with this witness.

Mr. Stone:

He was the wholesaler for Calvert in this area, and distributed the whiskey handled in this area. As a matter of fact, Calvert Distillers could not sell to the retailers. He and McKesson & Robbins were the only ones who could sell to retailers. As a matter of fact, that is alleged in the complaint.

Mr. Suthon:

I still insist that quantity discounts by wholesalers to retailers has no bearing on this contract.

Mr. Stone:

It has this bearing, when the deal is made, it puts the retailer in position to make large profits on the sales of a product even though he sells it far below the set price.

The Court:

I sustain the objection.

By Mr. Stone:

Q. In that period between April, 1948 did Calvert Distillers Corporation sell directly to anyone in this area?

A. What do you mean when you say "sell directly to anyone in this area?"

Q. Any retailers directly in this area?

A. Not that I know of.

Q. All of the Calvert then that was sold in this area was sold by the wholesaler?

A. That's right.

Q. And the two wholesalers were you and—

A. McKesson & Robbins.

Q. Did the Calvert Distillers Corporation's representative call on the retail trades with you at any time?

A. With me personally?

Q. With you or any of your employees?

A. Yes, called on the trade with my men.

Q. What was the purpose of that?

A. I imagine to sell merchandise and promote their items.

Q. Do you know whether or not Calvert Distillers participated in those deals that you referred to themselves?

A. Not that I know of.

Q. You mean that when a discount of two or three dollars a case was given by you for Calvert, that you or your firm did not participate in that?

A. I thought you meant when the representatives were with my men at the time they made the deals.

Q. When you made the deals you referred to for two or three dollars discount for quantity purchases, did you send the whole two or three dollars to the purchaser that you were given, or did Calvert participate in that with you?

A. If I recall right, Calvert did participate in it.

Q. And you participated in the discount?

A. Right.

Q. After a deal like that is made, is the retailer's price usually lower?

A. After a man gets a discount it is bound to get lower.

Objection: Mr. Suthon:

We object. It calls for a conclusion, not relevant or material.

The Court:

If you move to strike the answer to the last question, it will be sustained.

Mr. Suthon:

I move to strike the answer to the last question.

The Court:

Motion granted.

* * * * * * * * *

Q. Don't you know advertisements appeared in all of the papers on Calvert and other products supposedly fair traded, in which advertisers advertised those for sale at less than fair trade prices. Don't you know that?

A. I don't recall offhand right now whether they did or did not.

Q. Weren't you watching the Calvert market at that time?

A. I didn't solicit the trade to watch prices.

Q. You didn't care what they sold for?

A. That was the distiller's part.

Q. Didn't you tell some of the retailers you didn't care what they sold it for?

A. No. We suggested that they sell at retail price, and we always told them to go up in price.

Q. You always told them to go up in price?

A. Keep their price up.

Q. That was the instructions you gave them?

A. Yes.

Q. You must have found them selling for less—

A. When complaints came in.

Q. And you in turn advised the retailer to go up in prices?

A. Go up in prices if they were selling for less.

Q. You didn't report it to Calvert Distillers, did you?

A. That I don't recall, whether I did or not.

Q. How were these prices fixed to the retailer on Calvert?

A. The distillers would give us adjusted retail prices. I think they were figured on the basis of 33-1/3% to the retailer.

Q. Did those prices come to you from out of the State to Louisiana?

A. What do you mean when you say out of the State to Louisiana?

Q. How would you receive those suggested prices?

A. The distillers gave us suggested retail prices, what we were supposed to get.

Q. The distillers gave you the suggested retail prices?

A. Right.

Q. They never told you the fair trade price?

A. When it was the fair trade price they didn't.

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Q. Do you know the retail price of particular retailers with whom you made deals, sold Calvert for?

A. I was not interested in what they sold for, I was interested in selling.

Q. You sold them without restriction?

A. So far as I was concerned.

Q. You are familiar with the whiskey business generally in the city of New Orleans?

A. Right.

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By Mr. Stone:

Q. Don't you know that the practice prevailing in New Orleans while you were handling Calvert as a wholesaler in 1948 before Act 360 became effective, for the Calvert Distillers not to enforce fair trade contracts?

A. I don't know, I can't answer that.

Q. You know that they did not enforce it?

A. I can't answer that. As I recall, the contract was between the wholesaler and the retailer.

Q. Don't you know there were violations in New Orleans at that time?

A. I don't know.

Q. Don't you know that Calvert was sold off the fair trade contract during the few weeks before Act 360 became effective?

A. Maybe, but I don't know.

Q. You paid no attention to that?

A. No.

Q. Is there someone else who watches that?

A. No, Sir.

Q. Is there nobody in your firm that pays attention to that, Mr. Bologna?

A. No, sir.

Q. When you received your shipment of Calvert, from what places did that whiskey come? Do you know?

A. You mean the shipping point?

Q. Yes, the shipping point.

A. If I recall right I think it comes out of Louisville, Kentucky.

Q. Was any of that Calvert you distributed then manufactured in the State of Louisiana, that you know of?

A. Not, that I know of.

Q. It all came to you from outside of the State?

A. As far as I can recall.

By Mr. Wisdom:

Q. Did I understand you to testify that in some deals Calvert Distillers participated with you?

A. They didn't participate with me personally.

Q. It was a three-way transaction?

A. What do you mean by a three-way transaction?

Q. Distributor, wholesaler and retailer.

A. If I recall it right, Calvert's man worked with my man and if he had a deal they worked along with him.

Q. What do you mean by that?

A. If a man bought twenty-five cases of Calvert and we had a discount of two or three dollars, the retailer got two or three dollars, whatever the discount was.

Q. How much did you participate in that?

A. I don't remember.

Q. How many deals did you make in the period of a year?

A. I can't recall that.

Q. You can't recall that either?

A. No, sir.

Q. Can't you recall how much Calvert participated in the deal?

A. I can't recall, maybe a dollar, maybe a half dollar. I don't know.

Q. That is what I want to know. Do you know what happened after any particular deal, to the retail prices of Calvert?

A. I don't know what happened to it.

Q. You don't know what Calvert sold for after such a deal?

A. That's right.

Q You don't know?

A. Don't know what?

Q. What Calvert sold for after such a deal?

A. I wasn't interested to know. That was with the distillers.

Q. When you made the deal to the retailer, were you ever accompanied by a representative of Calvert?

A. I personally?

Q. Anyone of your firm, of your own knowledge.

A. They have representatives working with my men.

Q. So that in a typical deal they were represented by Calvert and a member of your firm?

A. We made deals as wholesalers, and if the men went out they know what went on.

Q. I understood you to say that they gave up One Dollar to One Dollar and a half, for example—

A. No, they didn't make it to the retailer. May I explain more fully?

Q. Yes.

A. If I have a deal with the distiller they may say: "I will give you fifty cents a case or a dollar a case." Maybe five cases, give $1.00 and twenty-five cases $1.50. My man makes the deal, but that is the wholesaler making the deal.

Q. When Calvert Distillers make a deal with you, is it understood you are to make a deal with the retailer?

A. No. They will talk to us about it and we contemplate the deal. They have never forced us to go into a deal.

Q. I am not asking you if they worked with you and the retailer?

A. They worked with me.

Q. Do they see the retailer with you?

A. If they are men of mine, yes.

Mr. Stone:

That is all, Mr. Bologna.

Cross Examination.

By Mr. Suthon:

Q. Is there a quantity discount in the absence of a deal?

A. I don't get that question, in the absence of a deal.

Q. Did you ever make deals with retailers without first getting Calvert Distillers to participate?

A. I made deals without the help of the distillers.

Q. Is that the custom, is that usual?

A. I don't know if it is usual, but I have done it.

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HAROLD J. BEVAN: Witness, being duly sworn on behalf of defendants, was examined and testified as follows:

Direct Examination.

Q. Please state your name?

A. Harold J. Bevan.

Q. What is your occupation, Mr. Bevan?

A. Sales Manager for James E. Comiskey Company.

Q. Does the James E. Comiskey Company distribute as a wholesaler the Calvert products?

A. Yes, sir.

Q. How long has Comiskey been handling as a distributor the Calvert products?

A. Approximately two and a half years.

Q. You were handling Calvert then before Act 360 went into effect?

A. Yes, sir.

Q. Were you handling Calvert in April, 1948 less than two years ago?

A. Yes, sir.

Q. Who were the other Calvert wholesalers in New Orleans at that time?

A. A. Bologna & Company.

Q. Since then and at the present time who are the Calvert wholesalers in New Orleans?

A. Since October First we are the sole distributors.

Q. Was McGuire a distributor?

A. Yes, sir.

Q. When was that?

A. We secured the line from him I think in May or June of 1947.

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Q. You are familiar with what the liquor trade in this area commonly refers to as deals, are you not?

A. Yes, sir.

Q. Would you explain to the Court what you consider a deal, Mr. Bevan?

A. We call it discounts on three case lots, five case lots, ten case lots, twenty-five case lots, so much discount off.

Q. Was it common practice prior to the effective date of Act 360 for Calvert to participate in any deals?

A. Calvert has never participated in any deals with us.

Q. Have you given any deals on Calvert?

A. Yes, sir.

Q. What kind of deals have you given on Calvert since April, 1948 and right before the effective date of Act 360, July, 1948?

A. In one instance you might give $2.00 off for ten case lots; fifteen case lots may be $2.50. I don't recall it.

Q. Don't you know advertisements appeared in the Newspapers selling Calvert at less than fair trade prices just before Act 360?

A. Yes, but I know Mr. McGuire seen a few people and told them he did not want his cut.

Q. That was before Act 360 went into effect?

A. Yes.

Q. He didn't do anything about it?

A. Maybe the customers raised the prices.

Q. Don't you know that practically every retailer who advertised in New Orleans, advertised Calvert and Seagram for sale at less than the fair trade prices during that period right before Act 360 went into effect?

A. I don't know that.

Q. Many of them did?

A. There were a few, yes.

Q. Many of them undersold?

A. I was not there when the purchase was made.

Q. You knew what they were selling for?

A. No, I didn't buy it.

Q. Don't you know that only last week the Continent Liquor Stores in this city were selling for less than fair trade prices in this city of Seagram?

A. I don't know that.

Q. Didn't you make the statement that you knew that Scharfenstein and Continent were underselling Calvert when he published his ad in November of this year?

A. I don't know anything, because he didn't have any prices in the Paper.

Q. Don't you know he was selling for less than fair trade prices since the first of this month?

A. I don't know.

Q. Didn't you make the statement that you knew?

A. I was there when the man phoned and got the prices, but I didn't see it.

Q. It was no surprise to you?

A. That he was cutting prices?

Q. Yes.

A. It was none of my business. I went there and asked him to raise the price with Mr. McGuire.

Q. Don't you know the American Drug Store in New Orleans a few weeks ago advertised all A-Blends at less than the fair trade prices?

A. Yes. He had signs in his window.

Q. Don't you know that Katz & Besthoff in New Orleans about a month ago advertised Calvert for less than the fair trade price in the city of New Orleans?

A. I think there was a cut in price, and I also know that the Calvert official went to see Mr. Chapital and asked him to raise the price.

Q. Don't you know that Katz & Besthoff on November Eleventh advertised Seagram 7 Crown here for $3.51 a fifth?

A. I can't remember that, that's a month ago.

Q. You read the liquor ads when they were in the Papers?

A. Yes.

Q. And you don't remember that?

A. Seagram doesn't interest me.

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Q. I show you a newspaper, the Times Picayune dated Saturday, November 12, 1949 in which an ad appears by Solari advertising Calvert Reserve, fifth bottle, for $3.25 and ask you whether or not you saw that ad in the Paper?

A. Yes, sir.

Q. You sell Calvert to Solari?

A. Our company. I don't know if we sold any prior to that, but I know we sold some since.

Q. I show you Newspaper dated November 10, 1949, the New Orleans Item in which there appears an ad by the American Drug Store, in which it states:

"The lid is off. Down go prices. All "A" Blends formerly $4.24 now $3.25." Is that the ad you stated you saw the American Drug Store run?

A. I told you I didn't pay any attention. I saw some in the window marked $3.25.

Q. I show you a copy of the New Orleans Item of November 10, 1949 on which there appears an ad of Pap's Food Store in which Calvert is advertised at $3.09 and I ask you whether or not you saw that ad?

A. Yes, sir.

Q. A a matter of fact, you know Pap's ran several ads to that effect?

A. Yes.

Q. In several Newspapers?

A. Yes.

Q. What was the fair trade price of Calvert at the time that these ads appeared in the Newspapers?

A. Well, I think the Calvert people at that time were getting the contracts out to be signed, right around November Ninth or Tenth.

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Q. What was the wholesaler's cost to the retailer of Calvert Reserve for fifths, per bottle without a deal?

A. $3.31-½ or $3.32.

Q. When Pap's advertised Calvert Reserve at $3.09 he was advertising it for sale below cost. Is that correct?

A. Yes, sir.

Q. Do you know if there was any prosecution of Pap's for those ads?

A. As far as Calvert, I don't know.

Q. You sell Pap's?

A. No, sir. Our company sold them, but had not sold any to Pap's prior to that.

Q. Your company does call on them?

A. Oh, yes.

Q. Does the James E. Comiskey Company participate in the fixing of the prices that Calvert will be sold for by the retailer to the consumer?

A. We were instructed by Calvert officials at a meeting to enforce a fair trade price of $4.24 and to ask all of them to ask for that price.

Q. When were you instructed to do that?

A. This was around November—the week following when the law became effective, when the law became valid.

Q. That was November Seventh?

A. Yes, sir.

Q. And a week later would be about November Thirteenth?

A. Yes, sir.

Q. Did you go out and tell the retailers to raise the price?

A. Our salesmen went out and told the customers to uphold prices on Calvert.

Q. At that time there were violations of prices in New Orleans?

A. Yes.

Q. Must have been, if you were told by Calvert Distillers to go out and enforce the fair trade contracts and told them to go up in prices?

A. Yes, because the new contracts had not been signed yet.

Q. Were you told to go out and do this before the new contracts became effective or after?

A. After.

Q. Before that they didn't tell you anything?

A. Told us it would be fair traded and were waiting for the contracts to be signed.

Q. And Calvert did not tell you it was not fair traded until the contracts were signed?

A. Waiting for the contracts to be signed.

Q. And according to their petition they allege they sent out notices through the Gulf States Beverage Journal of Coral Gables, Florida, so that would be about a week after the invalidation of Act 360. Was your meeting with the Calvert people after November 14th or before?

A. I am sure it was before. They called a special meeting.

Q. And they discussed conditions generally in New Orleans during that week?

A. Yes, sir.

Q. And you knew there was promiscuous undercutting of Calvert?

A. Yes, from ads in the Newspapers.

Q. And you were told, as I understand your testimony, they were going to enter fair trade contracts?

A. They were going to enforce fair trade prices as soon as they got the contracts out.

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Q. You knew up to two or three weeks ago there was no enforcement of fair trade prices by Calvert in this area?

A. I know Calvert instructed us to instruct all of our customers to raise the price to the suggested retail price and as soon as they caught someone they were going to take action.

Q. Mr. Bevan, I don't know whether or not you answered this question. I think I started to ask it. The actual price of $4.24 that Calvert sold for in this

area, who is that fixed by, Comiskey or anyone connected with Comiskey?

A. Fixed by Calvert to us.

Q. I am talking about retail sales, not wholesale prices?

A. Both prices are given to us by Calvert Distillers.

Q. They actually fix it?

A. Yes, sir, definitely.

Q. What office fixes it, the New York office or the local office?

A. I can't tell you that. Mr. McGuire here brings me the price lists on it.

Q. It might be in New York?

A. I don't know. It might be in St. Louis.

Q. Your firm is in New York?

A. No, sir, here in New Orleans.

Court recessed until 2:00 P. M.

2:00 P. M.: After Recess.

HENRY G. McGUIRE: witness, being duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. Henry G. McGuire.

Q. What is your occupation, Mr. McGuire?

A. Louisiana State Manager for Calvert Distillers Corporation.

Q. Are you also employed by the Calvert Distilling Corporation?

A. No, sir. I was employed by the Sales Company.

Q. You say you are the Louisiana representative?

A. Yes.

Q. Will you state to the Court exactly what function the Louisiana representative of Calvert Distillers Corporation perform in Louisiana—Louisiana Manager or representative?

A. State Manager. Just this. All Calvert business transactions go over my desk in the State of Louisiana.

Q. You handle all of the sales of Calvert products in the State of Louisiana for Calvert Distillers to the wholesalers?

A. Correct.

Q. Are you the only person employed by Calvert Distillers in Louisiana handling such sales?

A. Yes, but of course, I have six men in the State, three in New Orleans, one in Shreveport and one in Baton Rouge and one in Lake Charles.

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Q. Do you personally call on the Calvert wholesalers in this area?

A. Oh, yes.

Q. How many wholesalers do you have in New Orleans at the present time?

A. One now. We have had two.

Q. You have one now?

A. Yes, sir.

Q. How many did you have in March and April, 1948, and if more than one, who were they?

A. We had James E. Comiskey and A. Bologna & Company.

Q. A. Bologna is no longer your representative here?

A. That's right. I might qualify that A. Bologna is no longer our representative since October First. However, he still has some Calvert merchandise, and

I understand he will run out sometime this month. He didn't relinquish all of his merchandise to the other distributors, which is customary.

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Q. Where is the home office of Calvert Distillers Corporation?

A. Chrysler Building, New York City, the Sales Company.

Q. Do you know under what laws of that State Calvert is incorporated?

A. I don't know, but I think under the laws of the State of Delaware, Maryland.

Q. It is not incorporated under the laws of Louisiana?

A. I wouldn't know.

Q. Would you explain exactly what Calvert Distillers does in Louisiana in distributing Calvert products? How does Calvert Distillers handle the sales of its products to its wholesalers?

A. It is a very simple procedure. Our wholesalers order from us and the product is delivered. The order is processed in St. Louis and goes more or less to the regional office, and then to New York.

Q. Do you have the stock that you sell to your Louisiana purchasers in the State of Louisiana?

A. No, we do not.

Q. Have you a State license to engage as Broker in the State of Louisiana for Calvert?

A. No, sir.

Q. Aren't you actually acting as a Broker in the State of Louisiana for Calvert products?

A. No, sir.

Q. Let me see if I understand you again. You have no stock at all in Louisiana. You take an order form a wholesaler for whiskey, for Calvert products. You in turn send that order to your New York office?

A. No, sir, to our division office in St. Louis.

Q. What happens to the order after arrival in St. Louis?

A. It is processed in the St. Louis office and goes more or less to the reginal office, then to New York.

Q. Where is the order sent?

A. To Louisville and sometimes Maryland.

Q. So that all the whiskey that comes into Louisiana comes from Kentucky and Maryland?

A. Yes.

Q. So that all of the whiskey that comes into Louisiana comes from Kentucky and Maryland and is assigned to a definite wholesaler here in New Orleans. Is that correct?

A. I would say so.

Q. I mean, none of that whiskey is sent from Louisville or Maryland to Calvert Distillers for subsequent deliveries to the wholesalers?

A. No. All of our orders are processed in New York and liasoned to our plant in Louisville, Kentucky, to our traffic department.

Q. How long have you been connected with Calvert Distillers?

A. Since August, 1935.

Q. How long have you been stationed in Louisiana as their representative?

A. Since that time.

Q. When Calvert Distillers wishes to fix a retail price at the retail level, on its products, from which office does the established price originate? By that I mean, are you in your Louisiana office the one who fixes that price, or is it New York that fixes that price?

Objection: Mr. Suthron:

We object. I don't see the materiality of going into office procedure.

Mr. Stone:

We want to prove up the Interstate Commerce nature of this transaction, to show one integral transaction under Interstate Commerce clause, otherwise we could not argue it under the law. The only way we can prove it is one big integral movement from the Distillers into the retailers' hands.

The Court:

I don't think there is any question here as to Interstate Commerce. All shipments were made in Interstate Commerce.

Mr. Stone:

I want to show that the sale was integral at retail level and part of that commerce.

The Court:

I don't believe there is any question about it. Objection overruled. Suppose you answer the question.

A. That question is an involved one. I am certainly not at all instrumental in arriving at prices. inter-office correspondence, or checking freight rates here. My prices I get here comes from St. Louis. Our prices are made up in New York and sent to us—to the St. Louis office through the proper channels.

Q. Then the prices paid at retail level are actually fixed in New York and subsequently appear in the fair trade contracts. Is that correct?

A. I would say so.

Q. Except for freight and local taxes, does Calvert maintain the same prices throughout other States in the Union in which whiskey is sold?

A. Yes. Our base price remains the same regardless of the State.

Q. The only difference then is freight and local taxes, whatever they may be?

A. That's right. I might add to the question a moment ago, in getting up prices I have done it very often. I have drawn prices up and submitted to St. Louis, and one to New York. We do have the originals here. There are corrections, I can make mistakes.

Q. You mean you can fix the price for which Calvert can be sold all over the United States?

A. Yes, but they check up there.

Q. You mean the State tax?

A. The whole thing, check the whole price. I just did it recently on Carstairs.

Q. We are talking about Calvert. Isn't that price fixed at the retail level and you in New Orleans carry out that part—you have a part in it?

A. We all have a part in it.

Q. Louisville, Chicago and New York?

A. Not Louisville.

Q. St. Louis, Chicago and New York; you all have a part in fixing the prices at retail level?

A. Yes, sir.

Q. Mr. McGuire, I show you three contracts which your Counsel has advised are three of the contracts entered into in 1949 by Calvert Distillers, and I ask you to identify those contracts, if you can, by signatures?

A. Yes, sir.

Q. Are those contracts, the dates of November 12, 1949 between Calvert Distillers Corporation and Chester Bruning, and November 13, 1949 between Frank

Musso and Calvert Distillers Corporation, and November 16, 1949 between Calvert Distillers Corporation and Ben Abadie, contracts you entered into with these retailers on behalf of Calvert Distillers Corporation?

A. Yes, sir.

Q. Did you do that on instructions from your Home Office, or your office in New York, or out of State office, whichever it may be, or did you take it upon yourself without consulting them to enter into these contracts?

A. I did that on instructions from the office—

Q. Where are the originals of these contracts filed?

A. You have them there.

Q. Where are they usually kept after they are signed?

A. We generally keep them in our office.

Q. Weren't they actually kept in New York, the ones you just identified?

A. No. A couple of them went to New York as evidence that they were signed, and so on and so forth.

Q. Where were the contracts actually prepared?

A. I wouldn't know.

Q. You had nothing to do with the preparation of the contracts?

A. No, sir.

Q. Are these contracts the same as prevailed in other States, as far as Calvert is concerned?

A. I wouldn't know about other States.

Q. You are only concerned with prices—

A. I am only concerned with Louisiana.

Q. Do you know the exact date that notice was sent to Schwegmann Brothers that Calvert was fair trading its products?

A. I can't answer that.

Q. You don't know that?

A. I don't know.

Q. You didn't send out the notice?

A. I imagine it was probably on the 14th or 15th of November.

Q. They were then mailed?

A. They were mailed sometime prior to that, or on the 14th.

Q. Did your office mail them, or were they mailed out of one of Calvert's offices out of the State?

A. It was physically impossible for mail of that kind to cover the entire State. We use a Pitney-Bowes mailing machine which is in the hands of Gulf States Beverage Journal of Coral Gables, Florida.

Q. So that the only notice that Calvert Distillers sent to Schwegmann and other retailers, originated in Florida?

A. Correct.

Q. And you assume it was handled about the 14th of November?

A. The 13th or 14th, something like that.

Q. Where is the Calvert whiskey manufactured?

A. It is manufactured in Maryland and Kentucky.

Q. Any manufactured in the State of Louisiana?

A. Not to my knowledge.

Q. Mr. McGuire, I am going to show you some ads that appeared in the New Orleans Newspapers in November, 1949 and ask you whether or not you saw those ads when they appeared in the Papers? The first Ad I show you is in the New Orleans Item, dated Thursday, November 10, 1949, an ad by Pap's Food

Store in which Calvert is shown as being offered for sale at $3.09 a fifth, and I ask you if you saw that ad?

A. Yes, I saw it.

Q. I show you another ad by Pap's Food Store that appeared on Friday, November 11, 1949 in which Calvert Reserve is advertised for $3.09 a fifth. Are you familiar with that ad?

A. Yes.

Q. I show you the New Orleans Item of November 10, 1949 showing an ad by the American Drug Stores reading: "The lid is off.—Down go prices. All A-Blends formerly $4.25 now $3.25." Are you familiar with that ad?

A. Yes.

Q. Which of the Calvert products are considered A-blends?

A. A-Blend is a terminology that comes into this business, "A" not meaning that they are excellent by any stretch of the imagination. Many of them are good, many are not, but whiskey falling into that catagory sells for about $4.00 or $4.50.

Q. Is Calvert generally known in this area as A-Blends?

A. Yes.

Q. And you don't think it is good whiskey?

A. Under that classification some are good and some are not.

Q. What Calvert product was it?

A. Carstairs White Seal.

Q. What price did you maintain on those products?

A. $4.24 a fifth on Calvert Reserve; Carstairs White Seal, $3.81.

Q. Do any of those fall in that category as B-Blends?

A. None at that time.

Q. I show you advertisement dated Saturday, November 12, 1949 by Solari, in which it states: "Now—Let's sell Liquor Calvert Reserve, Schenley Reserve 5th bottle, $3.25." Are you familiar with that ad?

A. Yes, all ads.

Q. You know many ads were run during that week advertising Calvert products for less than $4.24?

A I read them all. It was to my interest to read them all.

Q. And you know many firms sold Calvert A-Blend for less than $4.24?

A. Yes.

Q. Did Schwegmann run any ad?

A. I don't know. I imagine he did.

Q. I tell you as a matter of fact he did not. Don't you know he hadn't run any price ads on liquor until Act 360 became invalidated?

A. I don't know.

Q. Have you any plans at this time to sue the American Drug Store, Katz & Besthoff, Pap's, and the others who advertised in the Newspapers; Solari who advertised Calvert for less than the fair trade price?

A. Those places had been shopped already.

Q. What do you mean by that?

A. Shopped to see whether the prices were in line.

Q. Do you mean to say that Solari and the American Drug Store and Katz & Besthoff did not honor the ads they run in those newspapers and sell this particular product at the price they advertised?

A. They did at that time.

Q. Did you follow the ads to see whether they were complying—

A. Our machinery wasn't set up then for Court cases.

Q. You got your machinery up in a hurry to shop Schwegmann?

A. The very next day, and also Katz & Besthoff, and those accounts you mentioned.

Q. Didn't you warn them first you were coming?

A. I went out to quite a few of these places and told them to raise their prices.

Q. But you don't intend at this time bringing any injunction proceedings against Katz & Besthoff, Solari, Pap's, or the American Drug Store for those violations which took place by newspaper advertisements, which you say you remember so well appearing after Act 360 was invalidated?

A. We shopped those places.

Q. Wouldn't those ads you saw in the Newspapers cause you to proceed against them?

A. That is a question for our attorneys to decide.

Q. But you don't know whether they honored those ads they had in the newspapers to sell Calvert at those prices?

A. They must have.

Q. Certainly they have, they must have. Don't you know it?

A. I say they must have.

. . . . . .

Q. You still have not answered my question as to why you did not prosecute those who had the ads in the Newspapers?

A. I am not the prosecutor.

Q. Aren't you the Manager?

A. Yes.

Q. Aren't you the one who represents the Calvert Distillers in the State of Louisiana to enforce their fixed prices, Mr. McGuire?

A. Yes, sir.

Q. Isn't that your job?

A. My job is to supervise that.

Q. It is not the lawyer's job to do your job?

A. My job is to supervise.

Q. Why didn't you prosecute those four or five you knew so well that advertised during that week instead of selecting Schwegmann to prosecute him?

A. Their prices were in line.

Q. Isn't it a fact that you had to clear these prosecutions in New York?

A. No, sir. I make that decision here.

* * * * * * * * *

Q. You know what a deal is in the liquor trade?

A. I should know.

Q. When Calvert wholesalers enter into a deal, it has been testified by two representatives of wholesalers, that frequently Calvert Distillers participate in that deal?

A. Correct.

Q. When that deal is made with a retailer to give him a discount per case on purchases of three cases, five cases, ten cases, doesn't Calvert Distillers, or don't they in many instances participate with the wholesaler in allowing that discount by standing part of the cost of that discount with the wholesaler?

A. That happens, but it takes many forms. A distributor asks us sometimes for fifty cents a case or a dollar, with the idea of increasing sales in a particular month, or get him an extra earning. Sometimes it is in the form of sales promotion, window displays

and counter displays. Sometimes it is taken off and added to what the wholesalers put up, and comes off in the form of trade discounts, yes.

Q. So that Calvert distributors does participate in the two or three dollars given by wholesalers to retailers?

A. Yes. When the wholesaler asks us for that sometimes we acquiesce and sometimes we don't. Generally we don't.

Q. Don't you frequently, in order to promote the sale of Calvert, encourage the wholesalers to go out and make a deal?

A. No.

Q. Do you not frequently encourage the wholesaler to enter into deals because of the large quantities of merchandise that you require him to take, which he must have the money to pay you for on a certain date?

A. No, sir. Our inventories at wholesale houses are considered very low.

Q. You have no inventories here in Louisiana?

A. We have normal inventories, about thirty days and—

Q. In New Orleans?

A. Yes.

Q. Calvert Distillers have?

A. Our wholesalers.

Q. You keep them supplied with a thirty day supply?

A. If they order it, yes.

Q. Don't you frequently force them to take merchandise?

A. Never.

Q. I am not talking about your Calvert Specials or Calvert A-blends. I am talking about other products distributed by Calvert Distillers.

A. We never force any of them to take anything they cannot sell.

Q. Your three salesmen and yourself call on the retail trade as well as the wholesale trade?

A. Their work is definitely one of sales promotion.

Q. So that you or anyone of those men working under you might go out with a salesman from the wholesaler to visit the retailer to try and encourage the sale of your products?

A. Oh, yes. His function is primarily that of sales promotion.

Q. Doesn't he frequently go out with salesmen of wholesalers when deals are made?

A. Not necessarily?

Q. Doesn't he make deals?

A. No.

Q. But Calvert representatives do call on the retail trade and keep in touch with the retail trade?

A. Oh, yes.

Q. And they call on retailers with wholesalers present?

A. Yes.

Q. And they do talk of deals?

A. With the wholesaler and not the distiller man.

Q. When the retailer buys any quantity at a reduction of three dollars a case, is it done with the idea the retailer will sell at reduced prices to the consumer?

A. No.

Q. It is only done in order that the retailer can make more money?

A. That's not the original intention. That means extra profit for that retailer for buying that much merchandise and putting it in the store and featuring it.

Q. Then you prohibit by this contract passing on that extra profit this retailer makes to the consumer?

A. Yes. We are opposed to cutting prices.

Q. As a matter of fact, don't you know the retailers do pass their savings on to the consumer?

A. He doesn't have to. He can pass it on to his clerk, if he wants to.

Q. Don't you know he frequently passes that on to his consumers?

A. Certainly.

Q. And isn't that the reason given in order to sell your products at a lower price to the consumer?

A. Not my company.

• • • • • • • • •

Q. You referred to machinery set up for enforcing fair trade. Exactly what do you mean by that?

A. I mean getting in touch with my superiors.

Q. Where are your superiors located?

A. One in St. Louis, one in Chicago, and of course, in New York, and discussing these things by telephone, meetings. That took time, and it took time to see the attorneys also. The department in New York must give us an okay on these things, and see that everything is all right and cleared, and everything. It takes time.

Q. You were in the Court room a little while ago when Mr. Bevan testified, the gentleman who represents one of your wholesalers?

A. Yes, sir.

Q. He said that Calvert had called a meeting to see to it that prices were upped on Calvert. Did you attend that meeting?

A. Yes, at the house of Comiskey. We have sales meetings every Thursday night. I am there on every Thursday night and I take part in the meetings. In fact, I took over most of that meeting in the discussions on fair trade, to tell them again what it meant, and I knew about it, and we told them we meant business, to encourage their customers to raise prices, and report it if anyone did not do it. I went to Shreveport, Baton Rouge and Lake Charles to tell them.

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By Mr. Suthon:

Q. Referring to the advertisement of the American Drug Store, advertisement on November 10 that you were shown by Mr. Stone, advertising A-Blends, which I understood you to say included Calvert Reserve at $3.25. Have you any information that after November 14 the American Drug Store was selling or advertising, or offering to sell Calvert products at less than the fair trade price?

A. The American Drug Store is not cutting the price of Calvert products.

Q. Have you had any contact with the American Drug Store?

A. Mr. Farnet phoned me himself.

Q. What were your contacts with him?

A. I went to him personally and asked him to raise his prices, if he had not done so, and my further contact was the shopping there.

Q. What was his response to you after you spoke to him?

A. He raised his prices.

Q. I believe Katz & Besthoff was mentioned in your examination by Mr. Stone. Have you any information that since November 14, that Katz & Besthoff were offering for sale Calvert products at less than the fair trade price?

A. Katz & Besthoff are not cutting prices.

Q. Did you have any conversation with anyone there?

A. Yes, Mr. Chapital.

Q. What was your conversation with him?

A. After he ran that ad he called me and wanted to know about Calvert's fair trade policy. I went up to see him personally and I told him our position on fair trade, and he asked if he ran the ad that day and cut prices would I do anything, and I told him I certainly would, that I would take Court action.

Q. Then what did he say?

A. He said: "That's what I wanted to hear."

Q. Mr. McGuire, I show you a clipping from the New Orleans States of Monday, November 7, the date, upon which the decision was rendered by the Louisiana Supreme Court on Act 360 of 1948, and I call your attention to the following printed language in that clipping, which I ask you if you read on or about November 7, or thereabouts? "A decision in favor of—" (Counsel reading down to) "—I would like to fight that law too." That is the end of the notation. Did you read that on November 7th?

A. Yes, sir.

Q. I also show you the Times Picayune of November 8th, in which the same language appears as attributed to Mr. Schwegmann. Did you see that on November 8th?

A. Yes.

Offer: Mr. Suthon:

We offer in evidence the two newspaper clippings which have just been referred to in the testimony of the witness, marking them for identification McGuire-1 and McGuire-2.

The Court:

Any objection?

Mr. Stone:

No objection.

By Mr. Suthon:

Q. You spoke about a meeting at Mr. Comiskey's house on Thursday night at which you had some discussion with the salesmen. Which Thursday was that with reference to the decision—

A. That was the 10th or 11th.

Q. I think it is agreed that the decision of the Louisiana Supreme Court was handed down on November 7th?

A. That's right.

Offer: Mr. Suthon:

We offer in evidence also the three contracts identified by this witness and we will mark them for identification Calvert-1, Calvert-2 and Calvert-3.

The Court:

Let them be admitted.

Mr. Suthon:

In connection with the 1948 contracts, I don't believe I will put all of them in the record. What about putting one in the record and then listing the others with the names and dates?

Mr. Stone:

Objection.

With reference to those 48 contracts, I would like to object on the ground those contracts are of no legal effect. I assume the time to argue that is when the case is being argued. I make that reservation at this time, objecting to those being introduced.

The Court:

I overrule the objection. Suppose you file one as a model and then make a list of the others, giving the dates and the names.

Mr. Stone:

That will be agreeable. I don't think Counsel needs to file the whole list, whether fifty, a hundred, or twenty-five. It will not affect the outcome of this case. He might file one or two in the record, and a few others, so we can get the difference in dates so we will know the period that is covered.

Offer: Mr. Suthon:

I offer in evidence to be marked Calvert-4 a contract between Calvert Distillers Corporation and Jake Graffagnini, dated March 26, 1948. And we will offer in evidence, to be prepared and filed after checking between Counsel, to be marked Calvert-5, a list of other similar contracts, with the dates and names of the parties to the contract in each instance.

The Court:

They will be accepted when filed.

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FRED SCHARFENSTEIN, witness, being duly sworn on behalf of defendants, was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. Fred W. Scharfenstein.

Q. What is your occupation, Mr. Scharfenstein?

A. Owner of Continent Wine and Liquor Company.

Q. Where do you operate?

A. 1215 South Claiborne Avenue, New Orleans, La.

Q. You have more than one store in the city of New Orleans?

A. Yes.

Q. How many stores do you have here?

A. Seven retail stores.

Q. And one wholesale establishment?

A. That is correct.

Q. Do you handle Calvert products as a wholesaler?

A. No.

Q. Do you handle Calvert products in your seven retail stores?

A. Yes.

Q. How long have you been in the retail liquor business in New Orleans?

A. Approximately 15 years.

Q. In addition to the retail stores that you own, are you connected with any liquor dealers associations in New Orleans or Louisiana?

A. No.

Q. Were you ever connected with any?

A. Yes.

Q. Did you hold any office in any liquor dealers associations?

A. Yes.

Q. What office did you hold?

A. Which one do you refer to?

Q. In any liquor dealers associations?

A. I was president of the Liquor Dealers Association.

Q. When did you terminate your office as president?

A. Six or seven months ago.

* * * * * * * *

Q. Do you know what Calvert was being sold for after Act 360 was invalidated by Act of the Supreme Court, by retailers in New Orleans?

A. After Act 360 was invalidated there became a condition which was very competitive and there were several different prices at which it was sold.

Q. Was it generally sold throughout the city of New Orleans for less than $4.24?

A. I don't know how general it was. All I can testify to is what ads I had seen in the newspapers, what somebody else might have undersold it for.

Q. And in your stores you immediately proceeded to sell for less than $4.24 too?

A. Correct.

Q. And you were selling Calvert for less up to and including December 6, 1947, when you ran your last ad?

A. In fact, I am selling it for less than that now.

Q. You are selling it for less than that now?

A. Yes.

Q. Why are you selling it for less than fair trade prices?

A. To meet competition.

Q. You mean you meet competition in the New Orleans area?

A. That is right.

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Q. Would you explain to the Court the present situation in New Orleans with respect to the sale of Calvert at the retail level?

A. You mean in quantity or price?

Q. Price.

A. I can't say what anyone else is doing except myself. I can't testify to what somebody else is doing.

Q. What do you mean by meeting competition?

A. I read ads in the papers. I read the newspapers to see what is going on. It is a policy of my company to meet competition where and when we find it.

Q. It wasn't only the ads that you used to predicate the meeting of that competition?

A. The only thing we could predicate it on.

Q. You have sold and you are still selling Calvert for less than $4.24 now, and I know of no ads that have appeared in the last few weeks on Calvert. Do you?

A. No.

Q. However, you are continuing to sell it for less now to meet competition?

A. Correct.

Q. What competition have you now?

A. If somebody comes in to buy whiskey and kicks about the price, and states he can buy it for less somewhere else, we try to meet competition.

* * * * * * * * *

Cross Examination.

By Mr. Suthon:

Q. Mr. Scharfenstein, did you receive a notice by mail from Calvert Distillers Corporation about three or four weeks ago with a list of fair trade prices?

A. Yes.

Q. Are you the same Mr. Fred Scharfenstein doing business as the Continent Wine and Liquor Company, which has been sued in this Court under suits No. 2624, Civil Action and No. 2625, Civil Action, the records of which I now hand you?

A. This morning in the Court room I was handed these particular papers and I have not had time to read them and say whether or not they are the same as the ones you have or not. I haven't had time to look at them.

Q. What are those numbers?

A. 2624 and 2625. Yes, that is correct.

Offer. Mr. Suthon:

We offer in evidence the record in the suit of Calvert Distillers Corporation versus Fred Scharfenstein, doing business as Continent Wine and Liquor Company No. 2624, Civil Action on the docket of this Court, and Seagram-Distillers Corporation versus the same defendant, No. 2625, Civil Action on the docket of this Court.

The Court:

Let them be admitted. The Court will take judicial notice of those, so they won't have to be filed.

Mr. Suthon:

That is all of the cross examination.

Mr. Stone:

That is all.

JOHN SCHWEGMANN, witness, being duly sworn on behalf of himself, was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. John Schwegmann.

Q. You are one of the partners in Schwegmann Brothers, a partnership?

A. Yes, sir.

Q. You are one of the parties sued in this proceeding by Calvert Distillers Corporation. Is that correct?

A. Yes, sir.

Q. Where is your business, Mr. Schwegmann?

A. 2222 St. Claude Avenue.

Q. What business are you in?

A. General retail merchandise business, food, hardware, liquors, wines, meats, vegetables.

Q. What kind of service do you have there, a self-service operation?

A. Yes. We have a retail operation. More or less everybody wants to help themselves and they buy and get checked out like the chain stores.

Q. You maintain a liquor department?

A. Yes.

Q. And in your liquor department you sell liquors and wines at retail. Is that correct?

A. Yes.

Q. Have you handled whiskey known as Calvert Special?

A. We got Calvert Reserve. We got hundreds of various whiskies. I think we got Reserve right now.

Q. You are charged with having sold Calvert Reserve whiskey at your place of business known as Schwegmann Brothers Super Market on Friday, November 18, for $3.35 including sales tax? Did your place of business consummate that sale, is that correct?

A. Yes, sir.

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Q. Your establishment sold Calvert products for less than fair trade prices?

A. Yes, sir.

Q. What Calvert did you then have in stock?

A. That was Mr. Gus Blancand I got a deal on. We got $3.00 a case off. I applied that and passed it on to my customers. I don't think it fair to overcharge my customers. My policy is to be economical and fair with all of my customers. That's what I made up my mind to do and that's what I did. I want my whole life to be straight, because that is the way all of us should make our living.

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Q. You have been in the Court room and you heard reference made to Pap's Food Store which sold Calvert at less than the suggested price. Pap's is located near you, is it not?

A. Within walking distance.

Q. What is your policy with respect to marking up prices?

A. Mr. Stone, I believe in a fair profit, not too much. I don't sell below cost. I couldn't meet Mr. Pap's prices and I ignore it. The price I sold my Calvert whiskey for was $3.25, plus sales tax. I watch and see where I can buy the cheapest, and I pass the savings on to my customers, but I can't sell below cost, and I am not going to try to.

* * * * * * * *

Q. Did you ever sign a contract with Calvert?

A. No, sir, never signed no contract.

Q. To fair trade their products?

A. No, sir.

Mr. Stone:

No further questions.

Cross Examination.

By Mr. Suthon:

Q. You know for years that Calvert had fair trade contracts with other retailers?

A. I knew some sort of contract was made. I never knew it was notification to me unless I signed it. I knew there were some contracts.

Q. You have known for years there is such a thing as fair trade contracts?

A. Yes, sir.

Q. And they had been made by Calvert with other retailers?

A. Yes, sir.

Q. But as you say, you never signed one yourself?

A. No, sir.

Q. And before this price list you got from Calvert in 1949, you had previously gotten another price list from Calvert?

A. In the mail there was all sorts of price lists on all other liquors. I wouldn't say that this was not included in there.

Q. You got fair trade price lists from various distributors from time to time?

A. Yes, sir.

Q. I show you, Mr. Schwegmann, a clipping from the New Orleans States, dated November seventh, already offered in evidence marked for identification "McGuire-1" and I call your attention to the heading in that clipping: "A decision in favor of the public," and ask you if you published that?

A. Yes, that's right. Can I say something?

Q. Yes.

A. I am a respector of the law. When a law is made that does not consider the welfare of the people—I don't say I would violate that law—but I use everything at my command to come into Court to nullify that law.

Q. Also another clipping of November eighth quoting you as having knowledge of the fair trade contracts. Is that correct?

A. Yes, sir.

* * * * * * * *

Q. Mr. Schwegmann, as to any Calvert liquor that you purchased after November 18, 1949, or thereabouts, after you got this price list from Calvert, as you say a few days before Thanksgiving Day, what did you propose to sell that for if you were not restrained, or would you have sold it at fair trade prices as notice to you by Calvert?

Mr. Stone:

Objection.

I object to that. What he proposes to do or proposes not to do is irrelevant.

The Court:

I overrule the objection.

A. Effective last Tuesday it wasn't whether I wanted to any more. It was a question of the minds meeting and making an understanding, not that I would want to do it, but I would do that. Whatever decision the Judge might make from today on remains in his power. I don't know what I will do tomorrow. That's a question for the Judge to decide.

Q. I don't think I made myself clear. You testified that you received a notice from Calvert a few days before Thanksgiving Day, giving you a list of fair trade prices binding on retailers. Now as to Calvert liquor that you bought from Calvert, would you feel that you would still sell at a cheaper price, or would you consider that you were bound to sell at the fair trade price?

A. I don't know if I could answer that question. They had a $3.00 rebate.

Q. I am not talking about what you bought from Mr. Blancand. I am talking about when you got that list?

A. We even stored away that liquor. I feel as though—in other words, I don't believe in that law. I don't think it is fair to the consumer, and I don't think at this time I could honestly say that I could do that. I think I could go on and sell cheap.

Q. Even after you received the price list of the liquor?

A. Let me see how I would answer that question. If I would have signed that contract, with this thing mailed to me, if I gave that man my understanding, I still think all that other liquor I bought from Gus Blancand, which

I bought that liquor before that notice was mailed to me, I could sell it cheap.

Q. You are still talking about a different liquor than I am asking you about. I am asking you after you got that price list?

A. Honestly in my heart I think I would. I would have to lie to you if I said I wouldn't. Whether it was the same price or more depends upon what kind of deal they gave me.

Mr. Suthon:

That is all.

Re-Direct Examination.

By Mr. Stone:

Q. Is it your intention to handle Calvert products after this case is disposed of, if you can't sell it for less than the fair trade price?

A. I think the merchandise I have, my customers should make that decision and not me.

Q. So you are intending to handle Calvert, are you not?

A. Yes, sir.

Q. With respect to the Calvert that you might buy right now, knowing that fair trade contracts are in existence, and assuming that those are valid contracts, and you were told that they were valid contracts, would you then violate the prices and sell it cheaper?

A. No, sir, but I would inform the people that the price they are paying for Calvert was more than I want to charge them. In other words, the law is in force right now.

Q. In other words, you would sell Calvert at the fair trade price, assuming that you are satisfied that this contract that they based their prices on is a valid one?

A. If the Judge said I had to do it I will do it and continue selling Calvert.

Q. If you were told the contract was a legal one by your counsel, you would continue to sell it at fair trade prices?

A. Yes, sir.

Q. You would not deliberately violate the fair trade contract unless you thought that the contract might be invalid?

A. If I entered into a contract with them and I agreed to sell it at the fair trade price I would do my obligation. In this case I didn't sign it, and if the Judge says it is in effect I will carry out the orders of my attorney and the Judge.

By Mr. Suthon:

Q. But if it were left to you without any order from the Court?

A. No, sir, I wouldn't go into no contract with anybody that would compel me to overcharge my customers.

Mr. Stone:

He still does not understand it.

The Court:

Develop it further.

By Mr. Stone:

Q. The question I want you to answer; if you purchased Calvert now—

A. Yes, sir.

Q. —and if this suit was dismissed, we will say, upon the ground that there is no violation because of the fact you had purchased this particular Calvert before the fair trade price went into effect—

A. Yes, sir.

Q. —and you had purchased Calvert, what would you do with respect to maintaining prices on that Calvert?

A. If I bought it before or after?

Q. If you bought it right now?

A. Well, I would have to charge the price.

Q. Charge the full legal price?

A. Certainly.

Q. Even though personally you would not want to do it?

A. That's right.

Re-Cross Examination.

By Mr. Suthon:

Q. Why would you have to charge the full price?

A. He says when I enter into a contract without being signed, I am only obligated when the notice arrives. This liquor I bought before does not enter into the contract, I don't become a party to the contract. I become a party to the contract when I receive a notice. No use me giving you my opinion.

Q. If this suit is dismissed you mean you would now sell this liquor at less than the fair trade price?

A. I don't think altogether. I didn't have a notice or telegram sent me, never was sent to me; never a man came to New Orleans asking me to sign that contract. They only write me what they are delivering.

Q. Then you would not think that you were bound by that contract unless you got an Order of Court, or signed the contract —

Mr. Stone:
He did not say that at all.

The Court:
Let Counsel finish with his question.

By Mr. Suthon:

Q. Then you don't think you are bound by that price list you now have gotten from Calvert even on Calvert liquor you buy today or after today, you would not think you were bound by that price list unless the Court ordered you to do so?

A. Since I am in a suit for injunction I don't think it would be a matter of what I think. What I am thinking is what I had before around the time they sent me the notice.

Mr. Suthon:
That is all.

• • • • • • • • •

Testimony On Behalf of Plaintiff.

MARVIN LEVIN, witness, being duly sworn on behalf of plaintiff, was examined and testified as follows:

Direct Examination.

By Mr. Suthon:

Q. Please state your name?
A. Marvin Levin.
Q. Where do you reside, Mr. Levin?
A. Miami, Florida.
Q. Who are you employed by?

A. I am the publisher and sole owner of Gulf States Beverage Journal, a liquor trade publication.

Q. About the middle of November, 1949, did you do any mailing of literature for Calvert Distillers Corporation to the liquor retailers in Louisiana?

A. Yes, I did.

Q. I show you two documents attached to the complaint in this case, one being a letter dated November 14, 1949, on the stationery of Calvert Distillers Corporation, addressed to "Dear Mr. Retailer," signed "Walter F. Terry, Assistant Vice-President," marked Exhibit-B, reading "This company has entered into Fair Trade Contracts, pursuant to the Louisiana Fair Trade Act, with retailers in the city of New Orleans," both of these documents attached to the complaint marked Exhibit-B, and I ask you if you mailed that document for account of Calvert to all Louisiana liquor retailers?

A. Yes, I did.

Q. From what point was that sent?

A. From Coral Gables, Florida.

Q. On what date was it mailed?

A. November 12, 1949.

Q. How about the postage on that mail, was it properly stamped?

A. Yes. We have a machine to stamp all envelopes.

Q. Can you tell me whether that mail included the literature to Schwegmann Brothers in New Orleans?

A. I can tell you if I refer to my list.

Q. Please refer to your list and tell me whether or not it was sent to them?

A. Yes. John, Jr., and Paul Schwegmann, and another one at 901 Piety Street, New Orleans, Louisiana.

Q. Can you testify positively both of the Schwegmanns were included in that mailing?

A. Yes, sir.

Q. You have a list of the Louisiana retailers, have you not, in your Journal?

A. Yes, sir.

Q. What class of mail was that sent by?

A. First class mail.

Q. Can you approximate how long it takes a piece of first class mail to come from Florida to New Orleans?

A. A maximum of two days.

Q. To how many retailers in the State of Louisiana approximately was that mailing sent?

A. We have them broken up into two sections, the city of New Orleans, and the balance of the State. Our mailing to New Orleans was 1400 and the balance of the State was 3400. There have been some new licenses added to the list which have not been received to date and those were not included in this mailing.

Q. How do you make your lists up?

A. We get them from the State ABC Board.

Q. Your mailing was completed around the middle of November of this year?

A. Of course.

Cross Examination.

By Mr. Stone:

Q. Mr. Levin, who instructed you to send out these notices?

A. Mr. Charles Isaacson from Seagram in New York.

Q. It is one of the subsidiary corporations?

A. No, Sir.

Q. He is office manager for Seagram, Calvert and Franklin?

A. That's right.

Q. He is in New York?

A. Yes.

Q. How did he communicate with you?

A. Called from New York and then sent the letters.

Q. What date did he call you on the phone?

A. The early part of November.

Q. He called you and—exactly what did he say?

A. That I have a Fair Trade mailing. Will you handle it for us for all New Orleans Account?"

Q. He told you that about November ninth?

A. Around that, yes.

Q. He told you he had a Fair Trade mailing and he wanted you to handle the mailing. Is that correct?

A. Yes, Sir.

Q. Your letter states Calvert Distillers Corporation, and you indicate the original letter is signed by one Walter F. Terry, and states: "This company has entered into Fair Trade contracts, pursuant to the Louisiana Fair Trade Act, with retailers both in New Orleans and elsewhere in Louisiana. The recent decision of the Supreme Court of Louisiana is not applicable to the Fair Trade Act or to these contracts, which are in full force and effect." Did he tell you that he had entered into new Fair Trade contracts then?

A. No, he told me nothing. All he told me was the mail he was going to send down.

Q. That was about the ninth or tenth?

A. Yes.

Q. And he mailed you this form letter? (Indicating).

A. Those were shipped to us air express from New York.

Q. Do you know exactly the date you received those in Miami, Florida?

A. The phone call was on the ninth and we received it on the tenth or eleventh.

Q. And you immediately made up envelopes?

A. Upon receipt of the phone call I asked him to send the envelopes down so we could address them.

Q. How long did it take you to address them?

A. Little over an hour.

Q. How long did it take you to stamp them?

A. Run them through in no time.

Q. Is it possible your letter to Schwegmann could have been mailed on the date it is dated and not on November Twelfth?

A. It was mailed on November Twelfth. I have my statement of mailing here. (Witness referring to document). It was sent out on the Twelfth.

Q. And you had gotten instructions to do that a few days before?

A. That's right.

Q. Did you have any negotiations with Calvert Distillers in New Orleans with respect to this?

A. Absolutely none.

Q. All your contacts were with New York?

A. That's right.

Q. Who sent you the prices that you enclosed in that Exhibit-B?

A. Those were attached to the letter.

Q. Also sent to you by New York?

A. That's right.

Q. For you to send to Louisiana?

A. Yes.

Mr. Stone:

No further questions.

Mr. Suthon:

This witness will also be needed in the Seagram case.

Mr. Stone:

Did he make them on the same date?

The Witness:

I mailed all of them on the same date.

By Mr. Suthon:

Q. Then as I understand it, as far as your mailing of this literature in New Orleans to Schwegmann Brothers, you would give the same testimony as you gave to the Calvert mailing? That is Mr. Stone's question as well as mine. It would apply also to similar literature of Seagram?

A. Yes, Sir.

Mr. Stone:

Except he may have talked to some other person than Mr. Isaacson.

Q. Was your conversation with the same person?

A. Yes, Sir.

• • • • • • • • •

DECREE GRANTING PRELIMINARY INJUNCTION.

United States District Court Eastern District of Louisiana, New Orleans Division.

Calvert Distillers Corporation,
versus Civil Action No. 2607
Schwegmann Brothers et al.

Filed December 20th, 1949.

This cause having been heard, submitted and taken under advisement on the motion of plaintiff for a preliminary injunction, and on the defenses to the demand for a preliminary injunction presented by defendants in their motion to dismiss and in their answer, and the Court having taken time to consider, and the law and the evidence being in favor of plaintiff and against defendants:

It is Ordered, Adjudged and Decreed, That the motion to dismiss of defendants be denied.

It is Further Ordered, Adjudged and Decreed, That the motion for a preliminary injunction herein be and the same is hereby granted and, accordingly, that upon the filing of a bond in this cause in the sum of $1,000.00, the said defendants, the partnership of Schwegmann Brothers, and the individual partners therein, John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, and each of them, their officers, agents, servants and employees, and all persons acting in aid of or in conjunction with them, or any of them, be and they are hereby enjoined and

restrained, pending the final hearing or sooner determination of this cause, from in any manner or by any means, direct or indirect, advertising for sale or offering for sale or selling any of the products or commodities of plaintiff, Calvert Distillers Corporation, which bear, or the labels or containers of which bear, the trade-marks or name of plaintiff, which defendants now have or which they may hereafter acquire, at prices less than the minimum prices shown for each of said products in the minimum price schedule of plaintiff dated November 14, 1949, and annexed to the complaint herein as Exhibit "B", which products and the respective minimum prices scheduled therefor are as follows:

	Minimum Consumer Retail Price				
"Brand	Half-Gallon	Quart	Fifth	Pint	Half-Pint
"Lord Calvert Blended Whiskey	$12.01	$6.06	$4.88	$3.08	$1.57
"Calvert Reserve Blended Whiskey	10.41	5.26	4.24	2.68	1.37
"Calvert Special Blended Whiskey			3.78	238	1.21
"Carstairs White Seal Blended Whiskey	9.34	4.72	3.81	2.41	1.23
"Calvert Distilled London Dry Gin		4.26	3.45	2.18	1.12

"The prices established above for each brand and size apply to all alcoholic beverages in the particular size which are sold under that brand name, regardless of differences, if any, in class, type, formula, proof, etc.

"The said prices include all Federal, State and City taxes except State and City sales taxes. These prices are applicable to all sales to consumers in the City of New Orleans and are not applicable outside the City of New Orleans."

as amended by the minumum price schedule issued by plaintiff under date of December 1, 1949, effective December 6, 1949, so as to incorporate in said minimum price schedules the following:

"A discount of not to exceed 10% is authorized on full case sales."

or at prices less than those which may be shown in any future minimum price schedule hereafter issued by plaintiff under and pursuant to its contracts with retailers, entered into in conformity with the Louisiana Fair Trade Act, and from making any rebates, refunds, discounts or concessions of any kind or character to purchasers in connection with the purchase of, or which will aid in decreasing the selling of said products or commodities below said minimum selling prices, save and except only in those cases wherein defendants are (a) closing out their stock for the purpose of discontinuing deliverying any of such commodities, or (b) when the goods are damaged or deteriorated in quality and notice is given to the public thereof, or (c) when the sale is by an officer acting under the orders of any Court.

It Is Further Ordered, Adjudged And Decreed, That this injunctive decree shall apply only to such commodities bearing the trade-marks and name of plain-

tiff as defendants have acquired since November 15, 1949, and as defendants shall hereafter acquire.

Thus Done And Entered at New Orleans, Louisiana, on the 20th day of December, 1949.

(S.) J. SKELLY WRIGHT,
United States District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON MOTION OF PLAINTIFF FOR PRELIMINARY INJUNCTION.

Filed: January 10, 1950.

(Number & Title Omitted.)

The Court hereby makes the following Findings of Fact upon the verified complaint, the exhibts attached thereto, the affidavits offered and filed in support of the motion for a preliminary injunction, and the evidence offered by both parties on the trial of the motion.

Findings of Fact.

1. Plaintiff is a Maryland corporation and for jurisdictional purposes a citizen of the State of Maryland. Defendants are a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, all residents of New Orleans, Louisiana, and all defendants are for jurisdictional purposes citizens of the State of Louisiana. The matter in controversy herein exceeds, exclusive of in-

terest and costs; the sum or value of Three Thousand ($3,000.00) Dollars.

2. Plaintiff sells and distributes to wholesalers and, for some years past, has sold and distributed to wholesalers on a large scale certain commodities (gin and whiskey) which bear the trade-marks owned by its parent company, The Calvert Distilling Company, and the latter's affiliate, Carstairs Bros. Distilling Co., Inc. Plaintiff's parent corporation and plaintiff's parent's affiliate, the owners of these trademarks, have specifically authorized plaintiff to establish and to enforce in Louisiana minimum retail prices for their trade-marked beverages. These commodities bearing the trade-marks, as herein set forth, are and have been sold on a large sale by retailers to consumers in the City of New Orleans and elsewhere in the State of Louisiana and throughout the United States. The good will attached to these commodities bearing the trade-marks owned by plaintiff's parent corporation and its affiliate and the demand therefor among the distributing trade and the consuming public are and have been of substantial value to plaintiff's parent corporation and its affiliate throughout the United States, in the City of New Orleans, and elsewhere in the State of Louisiana. Plaintiff's rights, as the sole distributor for these products in the State of Louisiana and in the City of New Orleans, are well worth substantially in excess of Three Thousand (3,000.00) Dollars. The commodities bearing the trademarks of plaintiff's parent corporation and its affiliate are and have been in free, fair, and open competition with other commodities of the same general class produced by others throughout the United

States, in the City of New Orleans, and elsewhere in the State of Louisiana.

3. The Calvert Distilling Company is a Maryland corporation which manufactures "Lord Calvert", "Calvert Reserve", and "Calvert Special" blended whiskeys, and "Calvert Distilled London Dry Gin". Carstairs Bros. Distiling Co., Inc., and affiliate of The Calvert Distilling Company, is a Maryland corporation which manufactures "Carstairs White Seal" blended whiskey. None of these products is manufactured in Louisiana. The trade-mark "Calvert" is owned by The Calvert Distilling Company and registered in the United States Patent Office in the name of that corporation. The trade-mark "Carstairs" is owned by Carstairs Bros. Distilling Co., Inc., and registered in the United States Patent Office in the name of that corporation. Plaintiff, Calvert Distillers Corporation, is a Maryland corporation wholly owned by The Calvert Distilling Company. It is the exclusive distributor in the State of Louisiana and other states for products bearing the "Calvert" and "Carstairs" trade-marks.

4. The same marketing scheme is pursued by plaintiffs for The Calvert Distilling Company and Carstairs Bros. Distilling Co., Inc. Retail prices on the Calvert and Carstairs trade-mark bearing products are established by means of fair trade contracts substantially identical throughout the United States, executed, pursuant to local law, by the local retail dealers and plaintiff. Pursuant to authority delegated by its parent corporation, the owners of the trade-mark "Calvert", plaintiff fixes retail prices schedules for its parent's trade-marked products. Pursuant to

authority delegated by its parent's affiliate corporation, the owner of the trade-mark "Carstairs", plaintiff fixes retail price schedules for its parent's affiliate's trade-marked products. Excluding variations depending upon freight rates and local taxes the retail price for these products is uniform in those states which permit retail price maintenance on alcohol beverages. In states in which retail prices established by fair trade contracts are binding upon non-signing retail dealers, notice of the retail fair trade contract prices then is given to local dealers. In this case price schedules and notices were prepared at plaintiff's head office in New York and mailed to defendant and other retailers from Coral Gables, Florida. Authority to enforce retailer maintenance of the retail prices for plaintiff's parent's and plaintiff's affiliate's trade-marked products is vested in plaintiff.

5. Plaintiff, a distributor of Calvert and Carstairs products in Louisiana, warehouses no goods in this state. Orders are received by plaintiff in Louisiana but processed out of Louisiana; title to merchandise passes outside of Louisiana. Plaintiff does not do business with wholesalers generally but operates through "exclusive" wholesalers, who are appointed to handle its products. On occasion plaintiff's agents assist these these local wholesalers by accompanying their sales representatives in soliciting sales of the merchandise distributed by plaintiff. At various times plaintiff authorizes its exclusive wholesalers to allow discounts on the purchases by retail dealers of the products it distributes, and participates with local wholesalers in absorbing a part of the discounts thus allowed. Neither the retailer nor the exclusive wholesaler fixes the retail prices. Plaintiff's head

office in New York City determines the price schedules.

6. After the adoption of Act 13 of the Louisiana Legislature of 1936 and the Act of Congress of Aug. 17, 1937, c. 690, Title VIII, 50 Sta. 693, 15 USC 1, plaintiff on various dates in March to June, 1948, entered into identical written contracts with a number of retailers in State of Louisiana, including retailers in the City of New Orleans. Under the contract terms these contracts were renewed by the inaction of the parties one year from the dates of their execution. On November 11 and November 12, 1949, plaintiff entered into identical contracts with retailers in the City of New Orleans. These contracts were made with respect to the commodities sold and distributed by plaintiff and bearing the trade-marks owned by its parent company and the latter's affiliate. Copies of the form upon which all of these written contracts were entered are atached to plaintiff's complaint as "Exhibit A".

7. During the interval from June, 1948, until November 10, 1949, plaintiff made no effort to enforce the contracts entered into in March to June, 1948, and renewed in March to June, 1949. On or about July 28, 1948, the Louisiana Alcohol Beverage Control Act (La. Act 360 of 1948) became effective. Section 24 of this statute fixed minimum prices for alcoholic beverages at all distributive levels, including the retail level. The minimum prices established for plaintiff's products were substantially the same as those established by previously executed fair trade contracts. Efforts to enforce these prices were made by the Louisiana Board of Alcoholic Beverage Control under

Act 360 of 1948 from July 28, 1948, until November 7, 1949. On this letter date, the Louisiana Supreme Court held invalid the price fixing provisions of the Alcoholic Beverage Control Act. The contracts entered into in November, 1949, are still in force and effect. It is unnecessary to determine whether the 1948 contracts and the renewals thereof are in full force and effect.

8. Plaintiff on or about November 14, 1949, established a new schedule of minimum prices under its contracts in the form of "Exhibit A" attached to the complaint, which new schedule of minimum prices was in the form of "Exhibit B" attached to the complaint and was effective November 14, 1949. This new schedule of minimum prices was promptly notified to the trade generally and to the other parties to the contracts with plaintiff in the form of "Exhibit A" attached to the complaint through the mailing of copies thereof by plaintiff to such parties. This schedule of minimum prices in the form of "Exhibit B", attached to the complaint, is the schedule of minimum prices in force between plaintiff and other contracting parties as of the dates material to this action, under the contracts in the form of "Exhibit A" attached to the complaint. These schedules of minimum prices were modified effective December 6, 1949, by an amendment allowing a discount not to exceed 10% on full case sales. As thus amended, these schedules constitute the schedule of minimum prices concurrently in force between plaintiff and other contracting parties under the contracts in the form of Exhibit A annexed to the complaint.

9. Defendants have never entered into any contract with plaintiff in the form of "Exhibit A" attached to the complaint, nor have they entered into any similar contract with plaintiff.

10. Defendants, with full knowledge of the contracts between plaintiff and other retailers in the City of New Orleans and elsewhere in the State of Louisiana in the form of "Exhibit A" attached to the complaint, and with full knowledge of the minimum price schedules set forth in "Exhibit B" attached to the complaint, on various occasions have offered for sale and sold at retail in their place of business in the City of New Orleans, State of Louisiana, commodities bearing the trade-marks owned by plaintiff's parent corporation and its affiliate at various prices below the minimum prices specified in said minimum price schedules in force at the time of such sales by defendants. Defendants will continue such selling activities unless enjoined and retrained therefrom.

11. Plaintiff has filed in this Court several other suits of a similar nature against other retailers, and has also made, or caused to be made, extra-judical efforts to persuade other retailers to desist from offering, advertising, and selling the commodities bearing its trade-marks and name at retail at prices less than those set forth in "Exhibit B". Plaintiff has not discriminated against defendants in the enforcement of the rights of plaintiff asserted by this suit, and has used due diligence in efforts to enforce those rights generally.

12. Defendants had on hand unsold residue of certain previously-purchased commodities bearing the

trade-marks and name of plaintiff, at the time when defendants received notice of plaintiff's schedule of minimum prices of November 14, 1949, as set out in "Exhibit B". The Court approximates the date upon which defendants received that notice as November 15, 1949, for the purposes of limiting the application of the injunctive relief sought by plaintiff to commodities acquired by defendants after the date of receipt of such notice.

Conclusions of Law.

The Court hereby enters the following Conclusions of Law:

1. The selling activities of defendants described in Findings of Fact No. 10 constitute unfair competition, violative of the legal rights of plaintiff, and are actionable by plaintiff; La. Act 13 of 1936; 15 USCA 1; Pepsodent Co. v. Krauss Company, Ltd., International Cellucotton Products Company v. Krauss Company, Ltd., 200 La. 959, 9 So. 2d. 303 Old Dearborn Distributing Co., v. Seagrams-Distillers Corp., 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 108, 106 A. L. R. 1476; Mennen Co. and Bristol-Meyers Co. v. Krauss Co., Ltd., 134 F. 2d. 348 (CCA 5, La.); Pepsodent Co. v. Krauss Co., Ltd, 56 F. Supp. 922 (D. C. La.)

2. Defendants have attempted to show that plaintiff's actions in fixing prices constitute a restrain of trade between the states. No findings on this feature of the case is required, however, in view of the Miller-Tydings Amendment to the Sherman Anti-Trust Act. Act of Congress of Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 USCA 1; Pepsodent Co. v. Krauss Co., Ltd., 56 F. Supp. 922 (D. C. La.)

3. Plaintiff has no adequate remedy at law and is therefore entitled to injunctive relief.

4. A preliminary injunction should be issued herein as prayed for by plaintiff, to apply only to such commodities bearing the trade-marks and name of plaintiff as defendants have acquired since November 15, 1949, and as defendants shall hereafter acquire.

(S.) J. SKELLY WRIGHT,
United States District Judge.

New Orleans, Louisiana,
January 10, 1950.

NOTICE OF APPEAL TO COURT OF APPEALS FOR THE FIFTH CIRCUIT.

United States District Court Eastern District of Louisiana, New Orleans Division.

Calvert Distillers Corporation,
versus Civil Action No. 2607
Schwegmann Brothers et al.

Filed: January 17, 1950.

To The Honorable, The United States District Court For The Eastern District Of Louisiana, New Orleans Division:

Notice is hereby given that Schwegmann Brothers, John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, defendants above named, hereby ap-

peal to the Court of Appeals for the Fifth Circuit from the judgment and decree granting a preliminary injunction entered in this action on December 21, 1949.

WISDOM AND STONE,
JOHN MINOR WISDOM
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendant.

312 Whitney Building,
New Orleans, Louisiana.

JOHN MINOR WISDOM.

STIPULATION OF RECORD ON APPEAL.

Filed: 3/16/50.

(Number & Title Omitted.)

It is hereby stipulated by and between Calvert Distillers Corporation, plaintiff and appellee, and Schwegmann Brothers, John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, defendants and appellants in the above entitled cause, by and through their respecive attorneys, that the following parts of the record, proceedings, and evidence in this cause are hereby designated to be included and shall be included in and constitute the record on appeal in this cause:

(1) Bill of Complaint;

(2) Fair trade contract form (Exhibit A), annexed to complaint;

(3) Affidavit of Henry W. McGuire, annexed to complaint;

(4) Motion to dismiss;

(5) Answer to complaint;

(6) Findings of fact and conclusions of law;

(7) Decree granting a preliminary injunction;

(8) Decree of Appeal;

(9) Order extending time to file record in the Court of Appeals;

(10) This stipulation;

(11) Appellants' statement of the points upon which they intend to rely;

(12) The following portions of the official Court reporter's transcript of the evidence in these proceedings:

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63	Entire page
64	Entire page
65	Entire page
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68A	Entire page
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82	Entire page
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95	Entire page
96	Entire page
97	1-6

(S.) JOHN MINOR WISDOM,
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Attorney for Defendants-Appellants.

312 Whitney Building,
New Orleans, Louisiana.

(S.) MONROE & LEMANN,
(Monroe and Lemann),
Solicitors for Plaintiff-Appellee.

1424 Whitney Building,
New Orleans, Louisiana.

STATEMENTS OF POINTS.

Filed: 3/16/50.

(Number & Title Omitted.)

Defendants-Appellants intend to rely on the following points in their appeal to the Court of Appeals for the Fifth Circuit:

I.

The Court erred in holding that the Miller-Tydings Amendment to the Sherman Anti-Trust Act permits price fixing in an interstate transaction as to one not a party to a fair trade contract.

II.

The Court erred in not dismissing plaintiff's complaint for failure to state a claim upon which relief could be granted. The Court should have dismissed the complaint on the ground that the fair trade contracts which constitute the basis of plaintiff's cause of action are null and void under the law of Louisiana in that the contracts lack mutuality, because plaintiff incurred no obligation hereunder; or, the alternative, if an obligation on the part of plaintiff inferentially exists, this obligation is subject to purely protestative conditions.

(S.) JOHN MINOR WISDOM,
(John Minor Wisdom),
Attorney For Defendants-Appellants.

312 Whitney Building.

CLERK'S CERTIFICATE.

I, A. DALLAM O'BRIEN, JR., Clerk of the District Court of the United States for the Eastern District of Louisiana do hereby certify that the foregoing 113 pages contain and form a full, true and complete transcript of the record, in the case entitled "Calvert-Versus-Schwegmann Brothers, Et Al." No. 2607 of the Civil Action Docket of this Court as made up in accordance with the Designation of Contents copied herein.

Witness my hand and seal of said Court at the City of New Orleans, La., this 23rd day of March, A. D., 1950.

A. DALLAM O'BRIEN, JR.,
Clerk,
By ANDREW J. BACON,
Deputy Clerk.

(Seal)

[fol. 99] JOINT MOTION AND ORDER TO CONSOLIDATE CAUSE FOR BRIEFING AND ARGUMENT—Filed March 30, 1950

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

SCHWEGMANN BROTHERS, ET AL., Appellants,

vs.

SEAGRAM DISTILLERS CORPORATION, Appellee

JOINT MOTION TO FIX CAUSE FOR ARGUMENT

To the Honorable the United States Court of Appeals for the Fifth Circuit:

The appellants and the appellee, appearing herein by and through their respective attorneys, move the Court to assign this cause for oral argument on some date prior to the date of adjournment of the Court for the present term, and to consolidate this cause, for purposes of oral argument, with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants vs. Seagram Distillers Corporation, Appellee, No. 13-163 of the docket of this Court, for the following reasons:

(1) This cause is a preference cause, involving a question of appellee's right to injunctive relief against appellants; the preliminary injunction granted by the District Court herein is now in full force and effect and binding upon appellants;

(2) This cause involves substantially the same questions of law as are involved in the cause now pending before this Court, entitled Schwegmann Brothers, et al., vs. Seagram Distillers Corporation, No. 13-163, in which cause the parties have filed contemporaneously with this motion a similar motion, praying that both causes may be consolidated for purposes of oral argument before this Court at the same time;

[fol. 100] (3) All parties desire that this matter be disposed of as expeditiously as possible and, to the end of dividing the time for preparing briefs equitably between them and also having both briefs served at least five days before the argument date, they hereby agree, subject to the approval of the Court, that appellants' brief shall be

delivered to the appellee by a date halfway between the date of notice of completion of the printing of the record and the date five days before the argument date, and appellee's brief shall be delivered to appellants five days before the argument date.

(4) The successor to the commercial partnership, one of the appellants herein, is now a party defendant in three causes presently pending in the District Court of the United States for the Eastern District of Louisiana, in which causes questions of law substantially similar to those involved herein must be argued and decided; decision in the instant cause may be of controlling authority in these causes now pending in the District Court;

Wherefore, appellants and appellee pray that this cause may be assigned and fixed for oral argument at New Orleans, Louisiana for some date before the adjournment of this Court for the present term; that their agreement, relative to division of the time available for preparing briefs be approved, and that this cause be consolidated for purpose of oral argument with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants, vs. Seagram Distillers Corporation, Appellee, No. 13-163 of the docket of this Court.

/s/ Wisdom & Stone, Paul O. H. Pigman, Wisdom and Stone, 312 Whitney Building, New Orleans, Louisiana, /s/ Monroe & Lemann, Walter J. Suthon, Jr., Monroe and Lemann, 1424 Whitney Building, New Orleans, Louisiana.

[fol. 101] Order

Considering the foregoing motion,

Let this cause be and it is hereby assigned and fixed for oral argument before this Court at New Orleans, Louisiana on the 7th day of June, 1950, appellants' brief to be delivered to appellee by the date halfway between the date of notice of completion of the printing of the record and the date five days before the argument and appellee's brief to be delivered to appellants five days before the argument date.

Let this cause be consolidated for purposes of oral argument with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants, vs. Sea-

gram Distillers Corporation, Appellee, No. 13-163 of the docket of this Court.

New Orleans, Louisiana.
March 30, 1950.

/s/ Wayne G. Borah, Judge.

[fol. 102] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

No. 13162

ARGUMENT AND SUBMISSION

Extract from the Minutes of June 7, 1950.

SCHWEGMANN BROTHERS, ET AL.

versus

CALVERT DISTILLERS CORPORATION

On this day this cause was called, and after argument by John Minor Wisdom, Esq., for Appellants and Walter J. Suthon, Jr., Esq., for Appellee, was submitted to the Court.

[fol. 103] OPINION OF THE COURT FILED—July 27, 1950

IN THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

No. 13,162

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

CALVERT DISTILLERS CORPORATION, Appellee

and

No. 13,163

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

SEAGRAM DISTILLERS CORPORATION, Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana

(July 27, 1950)

Before HUTCHESON, Chief Judge, and McCORD and RUSSELL, Circuit Judges.

HUTCHESON, Chief Judge: Based on diversity and amount, these two suits, brought under Sec. 2 of Act No. 13 of 1936, La. R. S. 51:391-396, the Louisiana Fair Trade [fol. 104] Act,[1] were for injunctions, preliminary and permanent.

Defendants appeared by answers and motions to dismiss, and, the applications for preliminary injunctions

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[1] "Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

coming on for hearing, there were findings of fact and conclusions of law in plaintiffs' favor, and a decree in each suit granting the preliminary injunction as prayed.

The defendant in each suit appealing, the two appeals were set and heard together, and now stand for disposition on appellants' two contentions.

One of these is that the so-called resale price maintenance contracts between plaintiffs and other retailers than defendants, on which enforcement of the fair trade act against the non-signing defendants is based, are null and void under the laws of Louisiana for want of mutuality or because of potestativity.

The second is that the scope of the resale price maintenance permitted (when valid under state law) by the Miller-Tydings Amendment [2] to the Sherman Act,[3] relied on by plaintiffs to save their price fixing activities from the Sherman Act does not extend to resale price maintenance against defendants, non-contracting retailers.

Appellees vigorously dispute the correctness of both of these contentions, and, by way of preliminary counter-attack, contrary to the position taken in their pleadings [fol. 105] and on the trial, assert that the sales sought to be enjoined were wholly intrastate sales, therefore beyond the reach of the Sherman Act.

They admit that each plaintiff operates on a nation wide scope and functions in interstate commerce; that each uses the mails interstate and functions in some respects from headquarters in New York in formulating the minimum price schedules under the fair trade contracts with various retailers in the several states having such statutes and in giving notice of these contracts and price schedules to all retailers in the state; and that the liquors which each plaintiff sells to Louisiana wholesalers are shipped in interstate commerce from points outside Louisiana to the purchaser in Louisiana following such sales.

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[2] Act of Aug. 17, 1937. See Ch. 690, Title VIII, 50 Stat. 693, 15 U.S.C., Sec. 1.

[3] Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U.S.C. Secs. 1-7.

They insist, however: that the reselling activities regulated by the injunctions herein represent the second intrastate transaction in the sequence of events following the movement of these liquors into Louisiana in interstate commerce pursuant to sales made by the distributors to Louisiana wholesalers; that these wholesalers then sell intrastate to retailers; and that these in turn sell intrastate to their customers.

Appellants, on their part, point to the facts: that plaintiffs have expressly invoked the Miller-Tydings Act; that they have expressly alleged a plan of general interstate operation and activity, in control of price and restraint of trade; that they have tried the case below on the theory that interstate commerce was affected; and that they have, without distinction between interstate and intrastate sales, sought and obtained an injunction whose purpose and effect is to maintain the pattern of restraints on commerce be- [fol. 106] tween the states which the plan was designed to, and does, make effective.

Citing in their support *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373, and *United States* v. *Frankfort Distilleries*, 324 U.S., 293, they urge upon us that appellees in thus focusing here on the particular sales made by appellants, have not only abandoned the theory on which the suit was brought and tried but have completely missed the point of decision in the *Miles* case, *supra*, at p. 400:

> "That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with 'most of the jobbers and wholesale druggists and a majority of the retail druggists of the country' and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several States, is also clear. *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211; *Bement* v. *Natl. Harrow Co.*, 186 U.S. p. 92; *Montague & Co.* v. *Lowry*, 193 U.S. 38; *Swift & Co.* v. *U. S.*, 196 U.S. 375."

We agree with appellants that though the sales made by appellants were made intrastate, the transactions, the subject of this suit, so affect interstate commerce and the exertion of the power of congress over it as to bring plaintiffs'

activities within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them.[4]

This brush fighting, of appellees' making, attended to and out of the way, there remains in the way of our reach-[fol. 107] ing the real battleground of the case, the scope of the Miller-Tydings Amendment, only the equally thin skirmish line which appellants have thrown out in support of their contention that the so-called "Fair Trade Contracts" relied on to support the action are not con-racts within the meaning of the Louisiana Fair Trade Act and the Miller-Tydings Amendment.

In our opinion, this position is as little tenable, is as easily turned and taken, as was the line behind which appellees fought their delaying action. In the first place, if we could agree with appellants' characterization[5] of these contracts, we could not agree with their conclusion that they would be insufficient to support the statutory action here brought. For it is perfectly plain that whatever the legal and binding effect upon the parties of "these fair trade contracts", it is with "these fair trade contracts"

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[4] *Atlantic Co.* v. *Citizens Ice & Cold Sto-age Co.*, 178 F (2) 453; *Dr. Miles Medical Co.* v. *Park, U. S.* v. *Frankfort*, *supra.*

[5] "'Contract' is purely a courtesy title when it is applied to a so-called 'fair trade contract'. The word has about the same relation to contracts (as the law knows contracts) as the term 'fair trade' has to fair trade in which retail competition is eliminated. In the advertising slogan 'fair trade contract', 'contract' is a counter word used to convey the impression of a long-accepted, honorable, sacrosanct legal institution—the Mutual Agreement." * * *

"Although these are statutory actions brought against non-signing retailers, the actions are premised upon the existence of a fair trade contract. In support of their action, appellees annexed to each complaint a contract typical of all contracts executed by each appellee. The same form is used by both appellees. The contracts—which undoubtedly were drawn in New York and not by the able Louisiana attorneys for the appellees—are set forth in full in the transcripts."

the statutes in question deal, it is to give effect to "these fair trade contracts" that these statutes were drawn.

But, if we could agree that, in using the word "contract", the statutes meant to, and do, deal only with contracts which are enforceable between the parties, we think the points appellants make against the contracts in question here are strained and without substance, and that they [fol. 108] will not stand up in the light of the modern decisional tendency in Louisiana and elsewhere. This tendency is against too readily lending the aid of courts to defeat contracts on grounds of want of mutuality[6] or the presence of a potestative condition.[7] When, therefore, escape from an obligation is sought on these grounds, it is now settled law that courts will, where reasonably possible to do so, find a contract definite and enforceable.

Coming at last to the main battle ground, whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act, the price maintenance contracts relied on in this case, we find both appellants and appellees, instead of coming and sticking to this point, each setting up and completely outfitting a straw man of his own, the legislative history of the act as he claims it to be, and each furiously laying about to knock the other's straw man down.

It is not for one who asserts rights under a state statute to prove as a condition precedent to its enforcement that the legislature had the right to enact it. He may stand upon the presumption of validity until such presumption is overthrown. This is especially so in this case since it is admitted, as indeed it must be, that unless it is prohibited by federal law, the Louisiana Fair Trade law has been

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[6] *Geo. W. Armstrong* v. *So. Pro. Co.*, 5 Cir. (5-26-50), and cases cited; *Port Chester* v. *Miller*, 1 N.Y.S. (2) 802; 281 N.Y. 101; 22 N.E. (2) 253; *Calvert Disti.* v. *Nussbaum*, 2 N.Y.S. (2) 320; *Hutzler Bros.* v. *Remington*, 46 Atl (2) 101; *Shreveport Tractor* v. *Mulhaubt*, 48 So. 144; *Grace* v. *Arnaud's*, 121 So. 359; *Houbigant Sales* v. *Woods*, 196 Atl. 683.

[7] La. Civ. Code, Arts. 2024; 2034; 2035; *Humble* v. *Guillory*, 33 So (2) 182; *Cockburn* v. *O'Meara*, 141 F (2) 779; *Conques* v. *Andrus*, 162 La. 73; 110 So. 93.

already determined to be a valid law of the state of Louisi-
[fol. 109] ana [8] binding on consenters and non-consenters alike as a declaration of state fair trade policy which the state is competent to make.

It is admitted, too, that it has been held in *Old Dearborn Distill. Co.* v. *Seagrams Distill. Corp.*, 299 U.S. 183, that state statutes of this character do not violate any provision of the Constitution of the United States, though a fair trade agreement "constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-Trust Act".

In this state of the law, proponents of, and protagonists for, the fullest scope for state fair trade statutes needed only the passage of a federal act relieving price maintenance contracts from the prohibitions of the Sherman Act. They did not need to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power, indeed in complete derogation of it, to do so. For the power to enact state fair trade laws derives not from the Congress, but from the inherent powers of the states.

In insisting, therefore, that the Miller-Tydings Amendment is ineffective to remove the prohibitions of the Sherman Act, as to non-signers, because it in terms refers to, and deals merely with, *price maintenance contracts which are valid by state law*, and does not in terms grant to the states power to make those laws effective against non-signers of such contracts, appellants wholly misconceive the issue.

[fol. 110] Likewise, appellees, when they devote a great part of their brief to the history of the act to demonstrate that it was the intent of Congress to cover laws binding non-signers, equally misconceive the issues, and take on a burden which they do not have to bear.

Agreeing, then, with appellants that the act is free from ambiguity and that there is no occasion to resort, or propriety in resorting, to its legislative history to find its meaning, we yet agree with appellees that, in comprehen-

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[8] *Pepsodent Co. & International* v. *Krauss Co.*, 9 So (2) 303; *Mennen Co. and Bristol-Meyers* v. *Krauss*, 134 F (2) 348.

sively and completely removing from the prohibitions of the Sherman Act *price maintenance contracts which are valid according to the law of a state*, the amendment removed every prohibition from, or impediment in the way of, the enactment by the states of fair trade laws, binding alike upon signers and non-signers.

This being so, it is wholly immaterial whether the Congress as a whole, or particular members of it,[9] in enacting the Miller-Tydings Amendment, did or did not have in mind that there were state acts applying to non-signers as well as signers and, therefore, did, or did not, have in mind the specific intent that the amendment should be effective as well against non-signers as against signers.

Read on its face and interpreted in accordance with that reading, what the amendment did was to remove all Sherman Act restrictions on agreements restraining trade in states where, by the state law, these agreements had been validated as to intrastate commerce. Thus a non-signer finding himself pursued under a fair trade act and without remedy as to intrastate transactions, is bound by the terms and wording of the amendment to find himself equally with-[fol. 111] out remedy as to interstate transactions. For when he invokes the Sherman Act to prevent the enforcement against him of the state law, he is referred to the Miller-Tydings Amendment of it with the inquiry, "What are you complaining of, the agreements which establish a fair price?" and the answer, "The Sherman Act as amended now validates them." If the non-signer answers, "No, I am not complaining of the agreements. I am complaining of the act of the state, which, though I did not sign them, requires me to respect those agreements, whereas the amendment of the Sherman Act, to which you refer, did not refer to, or authorize, state action against non-signers." "Sorry", replies the Sherman Act, "but the amendment neither authorizes nor prohibits state legislation. The control it exercises is not over, the effect it has is not upon, legislation by the states. It is concerned with, and only with, the Sherman Act, legislation by Congress affecting interstate commerce. The amendment, re-

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[9] Cf. *Fleming* v. *A. H. Belo Corp.*, 121 Fed (2) at p. 212-213.

moving from the prohibition of that act 'contracts or agreements prescribing minimum prices for the resale of a commodity' * * * 'when contracts or agreement- of that description are lawful as applied to intrastate transactions under' any state law, was enacted to, it did remove the Sherman Act as an obstacle in the way of completely effective state action, and there is nothing, therefore, that the Sherman Act can do for you."

Whatever then may be our views as to the unwisdom of the policy lying back of fair trade acts and the Miller-Tydings amendment, we are in no doubt that the judgment was right, and must be affirmed.

[fol. 112] RUSSELL, Circuit Judge, dissenting:

As to two of the underlying questions which should control the disposition of this case, we are all in agreement. That is that the transactions were so muct in interstate commerce as to be subject to the exercise of Congressional power in the regulation thereof and, also, that the provisions of the Miller-Tydings Amendment, relaxing the regulations in protection of interstate commerce evidenced by the Sherman Act,[1] are so clear as to render improper resort to the legislative history of that Amendment in applying its terms.[2] The sole point of difference between us therefore is the effect which should be given this amendment when read in the light of its unambiguous language.

It seems clear to me that the majority opinion enlarges and extends the provisions of the statute to a scope not justified by the legislative language. I can not agree that the amendment, merely by excepting from the prohibition of the otherwise illegal "contracts and agreements" forbidden by the Sherman Act, "contracts and agreements prescribing minimum prices * * * when *contracts* or *agreements* (italics supplied) of that description are lawful as applied to intrastate transactions" under the State law,

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[1] 16 U. S. C. A. §1-7.

[2] *Caminetti* v. *U. S.*, 242 U.S. 470; *Gemsco* v. *Walling*, 324 U.S. 244; *Ex Parte Collette*, 337 U.S. 55. *C. F. Sturges* v. *Crowningshield*, 15 U. S. C. A. §1-7.

likewise embraces within its exemption the provisions of any State *statute*, and this notwithstanding the only reference to such statute is that which might validate the "contracts and agreements." It may be further observed at this point, that the Miller-Tydings Amendment in no way sought to remove the prohibition against a "combination in the form of trust or otherwise, or conspiracy, in re-
[fol. 113] straint of trade or commerce among the several States."

The nature and purpose of the statute amended,—the Sherman Act,—requires that any amendment thereto which in anywise relaxes the statutory declaration of public policy should be strictly construed. As has been said, "the legislative purpose set forth in the general enactment expresses the legislative policy and only those subjects expressly exempted by the proviso should be freed from the operation of the statute."[3] Indeed, upon any basis, (except possibly from applying the statute, not as enacted, but upon conjecture which might arise from some features of its legislative history), it is difficult to perceive any basis for enlarging the plain meaning of its language. But we are all agreed that there is no occasion here for consideration of the legislative history of the Amendment, and therefore whatever may have been the intention of its sponsors, we are controlled by the amendment as actually enacted. The amendment deals only with "contracts and agreements" and in the absence of any enlarging provision, furnishes no basis for incorporating as an exemption from the Sherman Act any provision of a State Statute which restrains interstate commerce by provisions applicable to those who have not made the "contracts and agreements." My position is illustrated by the observation that the Miller-Tydings Amendment goes no further than to remove the taint of illegality attendant upon such contracts as to interstate transactions (*Dr. Miles Medical Co.* v. *Park and Sons Co.*, 220 U.S. 373) as is removed by section 1 of the Louisiana Act now in question as to intrastate transactions. Section 1 of the Louisiana Act relates, as likewise does the Fed-
[fol. 114] eral Act, only to establishing the legality of the *contracts* in question. That far, the two statutes are in

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[3] Sutherland on Statutory Construction, 3rd Ed. 1943, §4933; *U. S.* v. *Dickson*, 40 U.S. 141, 163.

pari materia. Section 2 of the Louisiana statute, upon which the present cause is predicated, is a substantive law of Louisiana, not a contract or agreement. I believe it may not be successfully contended that without section 2, the provisions of section 1 could be in any wise applied to retailers who had not seen fit to execute price maintenance contracts legalized by section 1. The terms of the Federal Amendment no more embrace section 2 of the Louisiana Act than does section 1 of that Act. Thus Congress has legalized the *contract* validated by the State law, but not every provision of the statute. If, over and beyond the establishment of the legality of the contractual obligation to maintain minimum prices, the State statute otherwise authorizes conduct or procedure which runs afoul of a Congressional protection of interstate commerce from unlawful restraint, such as the appellant defendant here asserts to be true as to him, such provision of the State statutes must yield to paramount Federal law.

It is not material whether the defense be declared predicated upon the lack of State power, or upon the ground that the enforcement of a State statute will result in a Federal Court of Equity basing the exercise of its injunctive power upon grounds which are illegal because of the Sherman Act. The result properly to be reached is the same, for the Federal Court must not require action which countenances conduct contrary to Federal law. In the present case, the Court could enforce section 1 of the Louisiana Act, but could not enforce that part of section 2 relating to non-contractors if, under the circumstances, such enforcement would be contrary to the Sherman Act. It is [fol. 115] recognized that in this time when the weight of interstate commerce affects multitudinous transactions, the construction here given the Miller-Tydings Amendment greatly circumscribes the relaxation of Federal control in the enforcement of State Fair Trade Acts. However, we should apply the statute as written. This construction removes the legal difficulty to the enforcement of permissive contracts, themselves declared illegal in *Dr. Miles Medical Co.* v. *Park and Sons Co., supra,* and likewise makes it clear that the provision of the Amendment that the making of such contracts shall not be an unfair method of competition, removes further infirmity theretofore found inherent in such contracts. *Federal Trade Commission* v. *Beech-*

Nut Packing Co., 277 U.S. 441. If the Congress determines it wise to further relax the prohibitions of the Sherman Act, it can very easily do so by merely excepting from its operation all provisions of State Fair Trade Acts, including their planned restrictive operations against sales by those in no wise obligated by any contractual relation restriction.

It is also clear that as to those who have not executed contracts or agreements validated by the Amendment, there may be combinations or conspiracies in illegal restraint of trade which have a basis over and beyond that afforded by the execution of contracts and agreements as such. If so, such contracts being legally permitted, of course would not themselves evidence any illegality of agreement, but neither would they raise a sanctuary for those who, though parties to legal contracts, might illegally combine or agree to restrain interstate commerce so far as non-contractors are concerned. This was recognized by the parties and the trial Court. That Court, being of the opinion that the Miller-Tydings Amendment, construed in the light of its [fol. 116] legislative history, in effect adopted the State Fair Trade Statute (as do my colleagues, but without resort to legislative history), expressly found as a conclusion of law, "defendants have attempted to show that plaintiff's actions in fixing retail prices constitute a restraint of trade between the states. No finding on this feature of the case is required, however, in view of the Miller-Tydings Amendment to the Sherman Anti-Trust Act." For the reasons I have stated, I do not accept this view. The proper disposition of this case would require us to adjudge that the Court was in error in holding that the Amendment removed the protection of the Sherman Act from non-contractors. He should have considered and adjudged the defendants' contention that, as to them, non-contractors, the plaintiffs' conduct constituted an illegal restraint of commerce between the states, at the same time giving to the plaintiffs the benefit of the Amendment so far as applicable to parties entering into the permitted price maintenance contracts. We should not evaluate the facts, which must be done in order to apply the law, in the first instance. I would reverse the judgment of the trial Court with direction that the case be thus heard and concluded.

[fol. 117] JUDGMENT

Extract from the Minutes of July 27, 1950.

No. 13162

SCHWEGMANN BROTHERS, ET AL.,

versus

CALVERT DISTILLERS CORPORATION

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Schwegmann Brothers, and Others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"RUSSELL Circuit Judge, dissents."

[fol. 118] PETITION FOR REHEARING FILED—August 10, 1950

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 13,162

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

CALVERT DISTILLERS CORPORATION, Appellees

CONSOLIDATED WITH

No. 13,163

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

SEAGRAM-DISTILLERS CORPORATION, Appellees

PETITION FOR A REHEARING

Appellants in the above styled causes represent that they are aggrieved by the majority opinion filed July 27, 1950, and petition this Honorable Court to grant a rehearing on the following grounds:

[fol. 119] I.

Respectfully and with all due deference, appellants submit that the majority of this Honorable Court misconceived the principal issue of this litigation. The issue, as counsel see it, is not the effectiveness of the Miller-Tydings Amendment to relieve from the prohibitions of the Sherman Act resale price maintenance by *contract*. Rather, the issue is the effectiveness of the Amendment with respect to resale price maintenance over and beyond contracts—*against non-contracting parties*.

II.

In the trial of this case, in the argument before the District Court, in the briefs and in the argument before this Honorable Court, counsel for appellants and counsel for appellees did not differ as to what constitute the issues in this litigation. Counsel for appellants and apparently counsel for appellees had no notion that this Honorable

Court would regard as the principal issue before it the question: "whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act resale price maintenance contracts". Prior to the filing of the majority opinion, this conception of the issue was expressed only by the Presiding Judge, briefly, without exposition, and then only in the course of the closing argument of counsel for appellees. It is respectfully submitted, therefore, that the determination of what really constitutes the issue was not given consideration by this Honorable Court commensurate with the importance of the case.

[fol. 120] III.

There is a basic inconsistency in the majority opinion. The opinion states that the Miller-Tydings Amendment is plain and unambiguous. But the effect of the decision is that the word "contracts" as used in the Amendment does not mean contracts. *In effect, according to the majority opinion, "contractual" includes "non-contractual"—just as if "navigable" should include "non-navigable" and "negotiable" should include "non-negotiable".* According to the majority opinion, non-contracting parties must bear the same burdens as contracting parties.

Counsel reiterate, and the Court has found, that the Amendment is plain and unambiguous. In its common meaning and in its technical legal meaning the term "contract" means an agreement, to do or to refrain from acts, between two or more persons, binding those persons and only those persons. Any other view of contracts ignores the meaning of the word and repudiates the long history of contracts as distinguished from status fixed by statute.

Wherefore, petitioners pray that this Honorable Court grant a rehearing in these causes and that it adopt the minority opinion as the majority opinion of this Court.

Respectfully submitted, (signed) Paul O. H. Pigman, Wisdom and Stone, John Minor Wisdom, Saul Stone, Paul O. H. Pigman, Attorneys for Appellants.

[fol. 121] BRIEF STATEMENT IN SUPPORT OF PETITION FOR REHEARING

I.

Respectfully, and with all due deference, it is submitted that the majority of this Honorable Court misconceived the issue in this litigation.

The majority opinion states that "both appellants and appellees, instead of coming and sticking" to the point of the case, set up "straw men", and then each "furiously . . . [layed] about to knock the other's straw man down." The "main battleground", according to the majority opinion, was:

> "whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act, the price maintenance contracts relied on in this case."

It is certainly true that appellants did not consider this an issue; nor did appellees. There has never been any doubt that the Amendment relieves resale price maintenance contracts from the Sherman Act. There has never been any dispute over the application of the Amendment to contracts, that is, the enforceability of resale price maintenance between contracting parties. The dispute is over the application of the Amendment to price-fixing over and beyond contracts, that is, the enforceability of resale price maintenance against non-contracting parties.

This case was carefully prepared by counsel for both sides. Counsel for appellees were counsel for Pepsodent [fol. 122] Company in *Pepsodent* v. *Krauss*, 56 F. Supp. 922 (D. C. La. 1944). Judge Borah, author of the opinion in that case and now a member of this Honorable Court, based his decision on the legislative history of the Amendment. In the instant case, the District Court relied on *Pepsodent* v. *Krauss*. There is a manifest reason why appellees were so anxious to go into the legislative history.[1]

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[1] Appellants reaffirm their position that the language of the Amendment is so clear that resort to the legislative history is improper. Appellants also reaffirm, however, that a study of the legislative history leads irresistibly to the

Appellees feared that they would be out of Court, if restricted to the plain meaning of the Amendment. They had to go beyond the statute in search of some justification for asserting that an exception,[2] in terms limited to contracts, includes non-contractual resale price maintenance imposed by statute on third persons not parties to the contracts. As expressed in the minority opinion:

> "Indeed, upon any basis (except possibly from applying the statute, not as enacted, but upon conjecture which might arise from some features of its legislative history), *it is difficult to conceive any basis for enlarging the plain meaning of its language.*" (Italics supplied.)

[fol. 123] It is respectfully submitted that the majority of this Honorable Court erred in not recognizing as the real issue:

> "Can or does an exception to the Sherman Act covering 'contracts and agreements' be extended to cover non-contractual, statutory resale price maintenance imposed on non-signers by the substantive law of the state, not by contract or agreement—in transactions affecting interstate commerce?"

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conclusion that the Amendment was intended to validate resale price maintenance only against willing contracting parties. As conclusive proof one need go no further than a comparison of the Miller-Tydings Amendment and a typical Fair Trade Law. The Amendment tracks Section 1; it omits any reference to non-signers (Section 2). If one goes further, one finds that the reason for the omission of any reference to non-signers is that the Amendment substantially follows the Capper-Kelly bills introduced in Congress in 1927, 1928, and 1931—*prior to the existence of any non-signer clause in any state statute, and actually prior to the passage of any fair trade law at all.*

[2] It is respectfully submitted that the majority of this Honorable Court did not give sufficient weight to the principle of statutory construction that an exception to a declaration of public policy should be strictly construed.

II.

The majority opinion states that "the proponents of . . . the fullest scope for state fair trade statutes needed only the passage of a federal act relieving . . . contracts from the . . . Sherman Act". Counsel respectfully submit that this reasoning begs the question, since it rests on the assumption that the meaning of contracts may be extended to include what, for lack of a better term, may be called non-contracts. If, however, as both the majority and minority of the Court agree, the legislative language is plain and unambiguous, the proponents of fair trade legislation needed something more than an exception for "contracts and agreements". As stated in the minority opinion, they needed an exception covering provisions of a state statute "applicable to those who have not made the contracts and agreements".

The Sherman Act unquestionably is an obstacle to resale price maintenance affecting interstate commerce. The Miller-Tydings Amendment removes that obstacle with respect to parties to a resale price maintenance contract. It does not follow, however, that removal of the obstacle as [fol. 124] to contracting parties has any effect on non-contracting parties.

The first Fair Trade statutes, from 1931 to 1933, validated, in intrastate transactions, resale price maintenance contracts between the parties *but contained no non-signer clause.* These contracts were ineffective against non-contracting retailers and did not accomplish their purpose of eliminating price competition. In 1933, California added Section 2 to its Fair Trade Law, binding non-signers. Other states, including Louisiana, adopted Fair Trade laws which follow almost identically the language of the *amended* California statute. Section 2, the non-signer clause, does not validate the contracts; that was already accomplished by Section 1. Section 2 superimposes an independent statutory obligation that is outside of the legal concept of a contract. Proponents of price-fixing found it necessary to bind non-contracting parties by statute in an intrastate transaction; it is equally necessary to bind non-contracting parties by statute in an interstate tra-saction (for purposes of avoiding the Sherman Act).

The minority opinion makes a forceful and convincing point: it would have been simple for Congress to have excepted from the Sherman Act resale price maintenance in accordance with "all provisions of state Fair Trade Acts, including their planned restrictive operations against sales by those in no wise obligated by any contractual relation restriction". Congress did not. The Amendment excepts only the contract clause embodied in Section 1. The Amendment tracks Section 1, word for word, but omits [fol. 125] any reference to non-signers (Section 2). As the minority opinion points out cogently:

> "I believe it may not be successfully contended that without Section 2, the provisions of Section 1 could be in any wise applied to retailers who had not seen fit to execute price maintenance contracts legalized by Section 1. The terms of the Federal Amendment no more embrace Section 2 of the Louisiana Act than does Section 1 of that Act. Thus Congress has legalized the contract validated by the State law, but not every provision of the statute . . . We should apply the statute as written."

III.

Apparently as a peripheral predicate for its conclusion, the majority opinion makes several references to the inherent power of the states to enact Fair Trade legislation, for example:

> "[It was not necessary] to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power . . . In insisting, therefore, that the Miller-Tydings Amendment is ineffective . . . as to non-signers, because it . . . does not in terms grant to the states power to make those laws effective against non-signers of such contracts, appellants wholly misconceive the issue."

Appellants do not question a state's power to enact Fair Trade legislation, regulating intrastate transactions, against signers and non-signers. But a state's authority is limited by the commerce clause of the United States [fol. 126] Constitution, the Sherman Act and any other federal statute in the field of interstate commerce. Pro-

ponents of the legislation found it necessary to secure a federal exception covering contracts; the state's inherent powers did not protect contracts in restraint of interstate trade, regardless of the validity of such contracts under state law. For the same reason that it was necessary to except contractual resale price maintenance from the Sherman Act, it is necessary also to except non-contractual resale price maintenance independently imposed by state statute on non-signers—regardless of a state's inherent intrastate power.

IV.

With respect and deference, counsel for appellants confess an inability on their part to understand the reason for the conclusion expressed in the majority opinion.

If the majority opinion is analyzed and an effort is made to reduce it to the terms of a syllogism, one would find as a major premise that the Amendment removes Sherman Act restrictions, in transactions affecting interstate commerce, on contracts which are valid in intrastate transactions. Appellants do not dispute this premise. The stated conclusion is: since a non-signer is bound in an intrastate transaction, he is also bound in an interstate transaction. The major premise, standing alone, does not support the conclusion, for the reason that there is no necessary relationship between a fair trade contract validating resale price maintenance by the contracting parties and an independent statutory provision imposing resale price maintenance on non-contracting parties.

[fol. 127] There is no express minor premise to close the hiatus between the major premise and the conclusion. As a matter of fact, no minor premise can be formulated to support the conclusion if, as is agreed, the Amendment plainly and unambiguously refers only to "contracts or agreements".

Counsel for appellants do not contend that all reasoning must be syllogistic or that an opinion of this Honorable Court to be sound must be capable of being subjected to the formalism of a syllogism. Counsel do contend, most respectfully, that against the yardstick of a syllogism, or, as stated in the minority opinion, "upon any basis (except possibly . . . conjecture which might arise from features of its legislative history)," the majority opinion is unclear.

V.

The decision rendered in this case is a major one in American jurisprudence, one that will be studied, analyzed, and weighed by all interested in the legal aspects of restraint of trade, statutory construction, and the interplay of intrastate and interstate transactions. But its greater importance lies in the field of practical economics. The decision will have a direct effect on the merchandising methods of retailers who, like Schwegmann Brothers, by efficient operations, a volume business, and a serve-yourself system, are able to reduce their costs and pass on corresponding savings to customers. The decision will be a green light for manufacturers and distributors who have refrained from fair trading their products for fear of just such litigation as this litigation. It will have a direct effect on customers who will have to pay more for their [fol. 128] goods than the goods are worth in a free market. In normal times this would be serious enough. In the present crisis detonated by the Korean war, perhaps the first of many crises or the start of one of long duration, in a period of rapidly rising costs of living, the danger of inflation omnipresent—the seriousness of a decision broadening the scope of a statute inherently inflationary multiplies in geometric progression.

Counsel would not presume even to intimate that these effects should enter into the Court's consideration of the *merits* of this cause. Counsel do urge, earnestly and respectfully, that the inescapable economic effects of the decision underscore the urgency of appellant's petition for rehearing and warrant a reexamination of the correctness of the majority opinion.

Respectfully submitted, (signed) Paul O. H. Pigman, Wisdom and Stone, John Minor Wisdom, Saul Stone, Paul O. H. Pigman, Attorneys for Appellants.

This is to certify that on the 9th day of August, 1950, I served personally on the attorneys for the appellee, the petition for rehearing and brief statement in support of the petition.

(signed) Paul O. H. Pigman, Attorney for Appellant.

This is to certify that this petition is filed in good faith and not for purposes of delay.

(signed) Paul O. H. Pigman.

[fol. 129] ORDER DENYING REHEARING

Extract from the Minutes of September 15, 1950.

No. 13162

SCHWEGMANN BROTHERS, ET AL.,

versus

CALVERT DISTILLERS CORPORATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.

RUSSELL, Circuit Judge, Specially Concurring:

Since my Brethren remain firm in their original opinion, no purpose could be served by the grant of a rehearing, and I therefore concur in the order denying the same.

[fol. 130] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 131] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 442

ORDER ALLOWING CERTIORARI—Filed February 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 443

SCHWEGMANN BROTHERS, ET AL., PETITIONERS,

vs.

SEAGRAM-DISTILLERS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1950.

CERTIORARI GRANTED FEBRUARY 26, 1951.

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UNITED STATES OF AMERICA.

DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA.

No. 2607 Civil Action.

SEAGRAM DISTILLERS CORPORATION,

versus

SCHWEGMANN BROTHERS, ET AL.

Appearances:

Messrs. Wisdom & Stone, John Minor Wisdom, Esq., Saul Stone, Esq., Paul O. H. Pigman, Esq., Attorneys for Defendant-Appellant.

Messrs. Monroe & Lemann, Walter J. Suthon, Jr., Esq., Robert G. Polack, Esq., Attorneys for Plaintiff-Appellee.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 17th day of January, 1950, at the City of New Orleans, Louisiana.

Extension of time granted by the Honorable United States District Court, Eastern District of Louisiana, bringing the return day up to and including April 4th, 1950.

BILL OF COMPLAINT.

Filed Nov. 25, 1949.

(Number and Title Omitted.)

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:

Seagram-Distillers Corporation, a corporation organized and established under the laws of the State of Delaware, brings this bill of complaint against Schwegmann Brothers, a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, and said John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, individually, all of the full age of majority and domiciled in the City of New Orleans, State of Louisiana, and for cause of action plaintiff avers that:

I.

Plaintiff now is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Delaware, and a citizen and resident of that State, having its domicile and principle place of business at Dover, Delaware, and New York, N. Y., respectively.

II.

Defendant, Schwegmann Brothers, is, and at all times hereinafter mentioned was, a commercial partnership doing business in the City of New Orleans, State of Louisiana, and a citizen and resident of that State, composed of defendants, John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, all of whom are citizens and residents of that State, having their domicile and principal place of

business in the City of New Orleans, Parish of Orleans, State of Louisiana, and within the Eastern District of Louisiana, in which place and in which district among others the acts herein complained of have been done by said defendants.

III.

The jurisdiction of this Court is based on diversity of citizenship, the matter in dispute and the amount in controversy, exclusive of interest and costs, being in excess of Three Thousand Dollars ($3,000.00), and the object of this suit is to obtain an abatement of defendants' acts herein complained of and to enjoin and restrain recurring and continuing trespasses by defendants upon plaintiff's rights of property, its business, good will, trade marks, names, brands and labels identifying its commodities, which are all of a value and amount largely in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

IV.

Plaintiff, Seagram-Distillers Corporation, is a wholly owned subsidiary of Joseph E. Seagram & Sons, Inc., an Indiana corporation, which parent company manufactures "Seagram's 7 Crown", "Seagram's 5 Crown", blended whiskeys, and "Seagram's Ancient Bottle" distilled dry gin and "King Arthur" distilled London dry gin, and owns the trade marks, "Seagram" and "King Arthur" which trade marks or trade names are registered in the United States Patent Office in the name of said Joseph E. Seagram & Sons, Inc.

Plaintiff, Seagram-Distillers Corporation, is the exclusive distributor for the State of Louisiana of the brands of whiskey and gin aforesaid, and also "Kessler's Private

Blend" blended whiskey, manufactured by an affiliate, Julius Kessler Distilling Co., Inc., an Indiana corporation, which owns the trade name, "Kessler"; and "Seagram's V. O.", "Seagram's '83' ", blended whiskey, and "Seagram's Pedigree Rye or Bourbon" straight whiskey, manufactured by an affiliate, Joseph E. Seagram & Sons, Limited, a Canadian corporation.

Plaintiff, Seagram-Distillers Corporation, has been specifically authorized by each and all of said producers and owners of the aforesaid trade names and brands to establish and enforce minimum resale and retail prices in Louisiana under the Louisiana Fair Trade law of the above-mentioned trade-marked and named beverages.

Said beverage products are sold in Louisiana only to wholesalers who in turn sell them to retailers for resale to the consuming public. All such products purchased from plaintiff for resale in Louisiana are purchased from and sold by plaintiff in interstate commerce, shipments being made from and title passing at a point outside of the State of Louisiana. All orders for merchandise by its Louisiana customers are subject to acceptance by plaintiff's executive office in New York.

V.

Plaintiff for several years past has sold or distributed, and now sells and distributes, within the State of Louisiana, the aforesaid whiskies and liquors which bear, or the labels or contents or which bear, the aforesaid trade marks, brands or names. Said products or commodities have been and are in fair and open competition with products or commodities of the same general class produced by others. The products or commodities distributed

by plaintiff, and bearing its aforesaid trade mark, brands or names, are, and for several years past have been, sold at retail through liquor stores and other establishments dealing in liquors throughout the State of Louisiana, and elsewhere in the United States.

VI.

By advertising and otherwise, "Seagram" products, identified as aforesaid, for several years past have been and now are well recognized and established commodities, both nationally and in the State of Louisiana, and "Seagrams" products, so identified, now enjoy, and for several years past have enjoyed, a good reputation among dealers, retailers and consumers. Plaintiff has established a valuable good will and has expended large sums of money in the creation and development thereof, and at all times has endeavored to so market its commodities or products that they should be offered for sale within the State of Louisiana at reasonable prices, and to induce retailers to handle its products or commodities, plaintiff has endeavored to create a public demand for its products or commodities at prices which will yield a fair profit to retailers handling them.

VII.

Several years ago there developed in the liquor trade a practice of cutting prices on advertised products or commodities well known to the public and sold under distinctive trade marks, brands and names. Such products were offered by retail dealers at prices conspicuously lower than the marked or established prices of said products or commodities, as so-called "leaders" for the purpose of creating the impression that their goods, of which the prices were not well known, were sold at corresponding reductions

and that all articles dealt in by a particular retail dealer engaged in price cutting were sold by him at less than they could be obtained elsewhere, and for the purpose of attracting customers to such stores and away from other stores. The stores at which such practices were prevalent became known as "cut rate stores". Such practice of cutting well known and established prices engendered a condition by which other retail dealers were forced to meet the cut prices advertised by their competitors. One cut produced another in retaliation, so that ultimately in a particular community well known articles identified by trade marks, b ands and names with established prices were offered at prices cut to a point which yielded no profit, and in many instances represented actual loss. Said price cutting resulted in the destruction of all incentive on the part of dealers to sell such commodities and in their consequent refusal to handle or to stock the same. As a further result of said price cutting, the producer or owner of such identified articles whose goods had been handled in this manner through no fault of his own, was deprived of a market and facilities for distribution and his business and good will seriously interfered with, and in many instances destroyed.

VIII.

The situation above set forth was particularly true in the State of Louisiana, especially with respect to whiskies and liquors, and had extended to other lines of merchandise. To remedy this evil and to safeguard the public against the creation and perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices under which fair and honest competition is destroyed or prevented, the legislature of Louisiana passed Act No. 13 of 1936, known as the "Louis-

iana Fair Trade Act". And, by amendment to the Sherman Anti-Trust Act, August 17, 1937, c. 690, Title VIII S 1, 50 Stat. (U. S. C. A. Title 15, S 1, Act 1937), it was provided:

"Provided, that nothing herein contained shall render illegal, contracts or agreements, prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title, as amended and supplemented; Provided, further, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other."

IX.

Pursuant to the public policy of the State of Louisiana, evidenced by the said "Louisiana Fair Trade Act" and to the provisions thereof, and in order to protect itself, together with wholesalers, retailers and the consuming public against the injurious and uneconomic practices recog-

nized by the said "Louisiana Fair Trade Act", and particularly against the price cutting hereinabove set forth, plaintiff adopted a system of doing business which consisted of entering into a standard form of contract with retail dealers in the State of Louisiana, involving and concerning plaintiff's products and commodities, bearing plaintiff's distinctive trade marks, brands, names and labels, and obligating said dealers to sell plaintiff's said products and commodities only to consumers at specified prices. Plaintiff annexes hereto as part hereof said standard form of contract, marked Exhibit "A", being a true and correct copy of the form of contract above referred to. On or about April 1, 1948, plaintiff entered into signed contracts with more than one hundred retail liquor dealers operating stores in the State of Louisiana, including some in the City of New Orleans, on said form of contract marked Exhibit "A". On or about November 10, 1949, plaintiff sent telegrams to all retail liquor dealers operating in the State of Louisiana, a true and correct copy of which telegram is attached hereto as part hereof, marked Exhibit "B". Plaintiff, in addition, on or about November 11, 1949, entered into signed contracts with six retail liquor dealers operating stores in the State of Louisiana, including some in the City of New Orleans, on said form of contract marked Exhibit "A". On or about November 14, 1949, plaintiff sent or caused to be sent, through its New York office and Gulf States Beverage Journal of Coral Gables, Florida, by first-class United States mail with sufficient postage attached for their transmission to all of the retail liquor dealers throughout the State of Louisiana, including the defendants herein and other dealers in New Orleans, Louisiana, a letter in which was enclosed a schedule of its current minimum prices of products distributed by it in Louisiana. Said letter called attention to the fact that a number of fair trade contracts

were then in effect in Louisiana which made the resale prices shown on the enclosed list binding on the other retailers regardless of whether they had signed the contract with plaintiff or not. Plaintiff annexes hereto as part hereof a copy of said letter of November 14, 1949, and its said schedule of prices which accompanies said letter, which are clipped together and marked Exhibit "C".

X.

Plaintiff is informed and believes, and so believing, avers that notwithstanding the existence of its fair trade agreements with authorized retail liquor dealers in the State of Louisiana, and full knowledge thereof by the defendants, defendants have sold at retail to the consuming public, and continue to so sell, the commodities or products bearing the trade marks, names, brands and labels of plaintiff at prices below the minimum retail prices set forth in Exhibit "C". Defendants have, therefore, violated said "Louisiana Fair Trade Act" (Act No. 13 of the Louisiana Legislature of 1936), defendants having actual notice and knowledge of the existence of numerous such contracts between plaintiff and other Louisiana retail liquor dealers who observe said minimum retail resale schedules and who distribute plaintiff's products and commodities identified as aforesaid. Defendants have also had actual notice and knowledge of the minimum retail resale price of plaintiff's products specified in the attached documents marked Exhibit "A" and Exhibit "C", which have been and are now in force.

XI.

Subsequent to the aforesaid notices and prior to the commencement of this action, defendants, as plaintiff is in-

formed and believes and so believing avers, with full knowledge of the existence of plaintiff's contracts, and of plaintiff's minimum retail resale price schedule, and with the purpose and intention of interfering with and destroying the effects thereof, and in violation of the provisions of the "Louisiana Fair Trade Act", have knowingly and wilfully offered for sale and sold at retail, and are now so doing, certain of the products and commodities of plaintiff bearing the name, trade marks, labels, brands of plaintiff and mentioned and described in the exhibits hereto annexed, particularly the whiskey distributed by plaintiff and known as "Seagram's 7 Crown", at less than the minimum retail price stipulated in the contract and price list hereto annexed, and marked Exhibit "A" and Exhibit "C". Defendants have always had an opportunity to purchase said products on the same terms and conditions as other retailers and dealers. Plaintiff, on information and belief, avers the following specific instances of such conduct on the part of defendants:

(1) Defendants did, on or about 6:30 P. M., Monday, November 21, 1949, sell a bottle of "Seagram's 7 Crown" whiskey, containing one pint, at the cut price of $2.20, plus sales tax of 7¢ or a total price of $2.27, when the price of said one pint bottle of "Seagram's 7 Crown" whiskey established in the fair trade agreements between plaintiff and other Louisiana retail liquor dealers was $2.68, plus sales tax of 8¢, or a total of $2.76.

(2) Defendants did on or about 7:30 P. M., Monday, November 21, 1949, sell a bottle of "Seagram's 7 Crown" whiskey, containing one-fifth of a gallon, at the cut price of $3.51, plus sales tax of 11¢, or a total price of$3.62, when the price of said one-fifth of a gallon of "Seagram's 7 Crown" whiskey established in the fair trade agreements

between plaintiff and other Louisiana retail liquor dealers was $4.24, plus sales tax of 13¢, or a total of $4.37.

(3) Defendants did, on or about 7:30 P. M., Monday, November 21, 1949, sell a bottle of "Seagram's 7 Crown" whiskey, containing one-fifth of a gallon, at the cut price of $3.51, plus sales tax of 11¢, or a total price of $3.62, when the price of said one-fifth of a gallon of "Seagram's 7 Crown" whiskey established in the fair trade agreements between plaintiff and other Louisiana retail liquor dealers was $4.24, plus sales tax of 13¢, or a total of $4.37.

(4) Defendants did, on or about 10:45 A. M., Tuesday, November 22, 1949, sell a bottle of "Seagram's 7 Crown" whiskey, containing one pint, at the cut price of $2.20, plus sales tax of 7¢, or a total price of $2.27, when the price of said one pint bottle of "Seagram's 7 Crown" whiskey established in the fair trade agreements between plaintiff and other Louisiana retail liquor dealers was $2.68, plus sales tax of 8¢, or a total of $2.76.

XII.

Said wilful acts of the defendants are contrary to the provisions and spirit of the "Louisiana Fair Trade Act", and constitute unfair competition as to plaintiff, and all retail liquor dealers within the State of Louisiana, including those under contract with plaintiff. Said wilful acts of defendants have induced, coerced and forced other retail liquor dealers under contract with plaintiff to violate their contracts with plaintiff. In addition thereto, a further consequence of defendants' aforesaid wilful acts is that the buying public, including customers of all retail liquor dealers in the State of Louisiana, are misled and induced thereby to believe that plaintiff's products or

commodities sold by defendants are not worth the prices at which they are nationally advertised and sold, pursuant to plaintiff's minimum retail resale price schedules. Retailers other than the defendants cannot profitably market plaintiff's commodities or products at the prices at which said products or commodities are advertised and sold by defendants. A continuation of such acts by defendants will produce great and irreparable injury to paintiff. It is impossible to ascertain the pecuniary loss which plaintiff has already suffered, and will suffer if the practices of defendants are permitted to continue. A continuance of such acts by defendants tends to result in irreparable loss of sales to plaintiff and the destruction of plaintiff's business and the good will pertaining thereto. Pecuniary compensation would not afford adequate relief to plaintiff, and it is necessary that defendants be restrained from continuing their wilful acts in derogation and violation of said "Louisiana Fair Trade Act" and of the rights of plaintiff thereunder as aforesaid, to prevent a multipilicity of suits. The wrongs complained of as above set forth imminently imperil and immediately threaten devastation of plaintiff's business, and destruction of plaintiff's good will, and multiple breaches, violations and cancellations of its said contracts with other retail liquor dealers throughout the State of Louisiana, and plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays that, after due hearing and upon presentation to the Court by plaintiff of such bond as the Court may require and approve, the Court grant a preliminary writ of injunction enjoining defendants, Schwegmann Brothers, a commercial partnership, and John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, the individuals composing said partnership, their officers, agents, servants and employees, and all persons

acting in aid or in conjunction with them or any of them, pending final hearing or sooner determination of this cause, from in any manner or by any means, direct or indirect, advertising for sale, selling, or offering for sale, any of the products or commodities of plaintiff, Seagram-Distillers Corporation, bearing the names, trade marks, labels or brands of plaintiff, which said defendant, Schwegmann Brothers, now has or which it may hereafter acquire, and mentioned and described in the contract, forms and schedules annexed and attached hereto, and marked Exhibit "A" and Exhibit "C", at prices less than those set opposite each of said products in said schedules as mentioned and described therein, or at prices less than those which may be shown in any future minimum retail prices schedules hereafter issued by plaintiff in connection with its contracts with other dealers; and from making any rebates, refunds, discounts or concessions of any kind or character for the purpose of or which will result in decreasing the said stipulated resale scheduled prices, except that in case defendants are (a) closing out their stock for the purpose of discontinuing delivering any such commodity, or (b) when the goods are damaged or deteriorated in quality and notice is given to the public thereof, or (c) when the sale is by an officer acting under the orders of any Court; and that upon final hearing, said injunction be made permanent and perpetual.

Plaintiff further prays for such other, further and different relief of any and every sort as to this Court may seem just, equitable and proper in the premises, together with costs and disbursements of this suit.

(S.) MONROE & LEMANN,
(S.) WALTER J. SUTHON,
(S.) ROBERT G. POLACK,
Solicitors for Plaintiff.

1424 Whitney Building,
New Orleans, Louisiana.

State of Louisiana,
Parish of Orleans.

Robert G. Polack, being duly sworn, deposes and says:

That he is an attorney at law and one of the solicitors for the plaintiff herein; that he has read the foregoing bill of complaint, and knows the contents thereof; that plaintiff is a foreign corporation and that none of its officers are within the State of Louisiana; that all of the allegations of fact contained in said bill of complaint are true and correct to the best of affiant's knowledge, information and belief; and that as to such matters as are stated on information and belief, affiant believes them to be true.

(S.) ROBERT G. POLACK.

Sworn to and subscribed before me at New Orleans, Louisiana, this 23rd day of November, 1949.

(S.) NICHOLAS CALLAN,
Notary Public.

EXHIBIT "A".

Seagram-Distillers Corporation.

This Agreement, made this .... day of ....., 194..., between Seagram-Distillers Corporation, a corporation with an office and place of business at 405 Lexington Avenue, New York City, N. Y. (hereinafter called "Distributor"), and ....., of ....., Louisiana (hereinafter called "Retailer"),

Witnesseth:

Whereas, Distributor is engaged in the business of distributing certain alcoholic beverages which are owned by Distributor and the labels or containers of which bear the

trade-marks, brands and/or name of Distributor, or the trade-marks, brands and/or name of the producer thereof, and

Whereas, in each case in which Distributor does not own any trade-mark, brand or name used in connection with any such beverage, Distributor has been specifically authorized by the producer owning such trade-mark, brand or name to establish a minimum resale price for such beverage pursuant to the provisions of the Fair Trade Act of the State of Louisiana, and

Whereas, said beverages are in fair and open competition with commodities of the same general class produced or distributed by others, and

Whereas, Distributor and Retailer desire to avail themselves and the public of the benefits of the said Fair Trade Act, and to avoid having such trade-mark and branded articles made the subject of injurious and uneconomic practices, and to avoid the depreciation of or damage to said trade-marks, brands or names through such practice,

Now Therefore, the parties hereto agree as follows:

First: Retailer will not sell, advertise, or offer for sale within the State of Louisiana any alcoholic beverage which Retailer has purchased, or now has on hand, or may hereafter purchase, and which (a) bears the trade-mark, brand or name of Distributor, or (b) is distributed by Distributor and bears the trade-mark, brand or name of the producer of such beverage, at less than the minimum price for such beverage stipulated from time to time by Distributor. Retailer further agrees that he will not offer or give any article of value in connection with the sale of such bever-

age, or sell or offer for sale any such beverage in combination with any other commodity, or make any refunds, discounts or concessions of any kind, whether by the giving of coupons or otherwise, for the purpose of, or which will result in evading the minimum price restrictions imposed under this contract.

Second: In the event (a) of closing out of Retailer's stock for the purpose of discontinuing dealing in any alcoholic beverage to which this contract is applicable, or (b) that any such beverage in Retailer's hands is damaged, defaced, or deteriorated in quality, or (c) that Retailer has on hand any of said beverages after this agreement has been terminated or canceled for any reason, Retailer, before offering the beverage or beverages in question for sale at a price or prices less than the minimum prices fixed therefore pursuant to this contract, shall first give Distributor reasonable notice in writing and an opportunity to purchase such beverage or beverages at the original invoice price at which Retail purchased such beverage or beverages.

Third: The minimum prices of said beverages in sales by Retailer to consumers shall be in accordance with written schedules furnished from time to time by Distributor to Retailer, which schedules shall constitute a part of this contract. Distributor reserves the right at any time, and from time to time, by giving written notice to Retailer, to change the minimum prices specified in said schedules, to eliminate one or more beverages from the operation of this contract, and (subject to the provisions of the said Fair Trade Act) to extend the operation of this contract to one or more additional beverages. Said notice may be given by delivering the same to Retailer in person, or to any employee of Retailer at Retailer's principal place of business,

or by mailing the same by registered or ordinary mail addressed to Retailer at Retailer's place of business, and shall be effective upon the expiration of five (5) days after the delivery or mailing thereof, as the case may be, Sundays and holidays included. The schedule which shall have last become effective shall govern the minimum prices for said beverages at the time each particular sale, advertisement, or offer of sale is made.

Fourth: Inasmuch as it would be impracticable or extremely difficult to fix the damage which may be sustained by Distributor by reason of a breach of this contract by Retailer, it is agreed that the Retailer shall pay to Distributor, as liquidated damages, the sum of Fifty ($50) Dollars for each breach of this contract. It is further agreed that Distributor, in addition to all other legal rights and remedies, shall be entitled to injunctive relief against any and all breaches of this agreement by Retailer.

Fifth: This contract shall expire in one year from the date hereof, but shall be renewed from year to year unless at each termination date the parties hereto indicate in writing their desire not to have the contract renewed. Distributor reserves the right to cancel this agreement on twenty-four hours written notice to Retailer, which may be given in the manner prescribed in paragraph "Third". Neither termination nor cancellation shall affect any right which shall have accrued to either of the parties hereto under this contract or the said Fair Trade Act prior to such termination or cancellation, or affect the application to Retailer of the provisions of the said Fair Trade Act relating to non-contracting parties.

This contract supersedes any previous contracts, based on the said Fair Trade Act of Louisiana between the parties hereto.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

SEAGRAM-DISTILLERS CORPORATION,
Distributor.

By .....

.....
Retailer.

By .....

State of Louisiana,
Parish of Orleans.

Sidney E. Rudman, being duly sworn, deposes and says:

That he resides in the City of New Orleans; that Seagram-Distillers Corporation did, on or about April 1st, 1948, enter into signed contracts with more than one hundred retail liquor dealers operating stores in the State of Louisiana on the printed form of retail fair trade sales agreement, a true and correct copy of which form is attached to the bill of complaint in this case and marked Exhibit "A", and providing for the maintenance of minimum retail price schedules; that Seagram-Distillers Corporation has, on or about November 10, 1949, sent telegrams to all retail liquor dealers operating in the State of Louisiana, a true and correct copy of which telegram is attached to the bill of complaint in this case and marked Exhibit "B"; that Seagram-Distillers Corporation has, on or about November 11, 1949, entered into signed contracts with six retail liquor dealers operating stores in the State of Louisiana on the printed form of retail fair trade sales agreement, a true and correct copy of which form is attached to the bill of complaint in this case and marked Exhibit "C", and providing for the maintenance of minimum retail price schedules; that he caused to be mailed

through the New York office of Seagram-Distillers Corporation and Gulf States Beverage Journal of Coral Gables, Florida, by United States mail, postage prepaid, on or about November 14, 1949, a copy of the notice of the minimum retail price schedules on products of Seagram-Distillers Corporation, identical with the form attached to the bill of complaint in this case, and marked Exhibit "A"; that a copy of said notice was addressed and mailed to Schwegmann Brothers Super Market at 2222 St. Claude Avenue, New Orleans, Louisiana; that when Seagram-Distillers Corporation caused to be mailed a copy of said Exhibit "A" to Schwegmann Brothers Super Market, it also caused copies thereof to be mailed simultaneously to all other retail liquor establishments in Louisiana.

(Sgd.) SIDNEY E. RUDMAN.

Sworn to and subscribed before me at New Orleans, Louisiana, this 21st day of November, 1949.

(Sgd.) ROBERT G. POLACK,
Notary Public.

ANSWER TO COMPLAINT.

Filed Dec. 12, 1949.

(Number & Title Omitted.)

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:

First Defense.

The complaint fails to state a claim upon which relief can be granted, because the plaintiff's attempt to use con-

tracts with certain Louisiana retailers as a basis for fixing the prices of non-contracting Louisiana retailers violates the Sherman Anti-Trust Act, as amended by the Miller-Tydings Act, insofar as sales affecting interstate commerce are concerned. The sales which form the basis of the complaint are an integral part of a general pattern of transactions affecting interstate commerce.

Second Defense.

The complaint fails to state a claim upon which relief can be granted, for the following reasons:

(1) The contracts executed on or about April 1, 1948 expired one year from the date of execution. Such contracts could not be renewed under the renewal clause, because of Regulation 8 of the Louisiana Board of Alcoholic Beverage Control. Regulation 8 (effective November 9, 1948; rescinded, effective November 12, 1949) prohibits the execution of fair trade contracts "affecting the prices of liquor in the State of Louisiana". A copy of Regulation 8 and a copy of the Board's order rescinding the regulation are attached hereto, as Defendants' Exhibits "A" and "B".

(2) The contracts referred to as having been executed "on or about November 11, 1949", which were the subject of plaintiff's notice to non-contracting dealers dated "New York City, November 14, 1949", were executed on or before November 11, 1949. The contracts are null and void, because they were in violation of Regulation 8 of the Louisiana Board of Alcoholic Beverage Control, Defendants' Exhibit "A".

Third Defense.

The complainant fails to state a claim upon which relief can be granted, for the following reasons:

(1) Implicit in Act 13 of 1936 is the mandate that a producer, distributor, or wholesaler availing itself of this extraordinary statute must maintain a uniform price policy. Plaintiff has not maintained a uniform price policy. In the enforcement of its prices, plaintiff winks at price-cutting of certain dealers, especially those who cooperated with plaintiff in sponsoring and defending the price-fixing features of Act 360 of 1948. Plaintiff discriminates against other dealers, and particularly against defendants who attacked the price-fixing features of Act 360 of 1948.

(2) Plaintiff comes into Court, seeking equitable relief, with unclean hands in that it has enforced its resale prices in an arbitrary and discriminatory manner.

Fourth Defense.

The complaint fails to state a claim upon which relief can be granted. The acknowledged basis for holding non-contracting parties to prices fixed in a so-called fair trade contract is to protect the good will incident to ownership of a trade-mark. The contracts upon which plaintiff relies in this action were not entered into by the producer or by the owner of the trade-mark in question, but by a distributor, a separate corporate entity having no ownership of the trade-mark. The contracts relied upon here do not, therefore, come within the contemplated scope of Act 13 of 1936 or of the Miller-Tydings Amendment to the Sherman Anti-Trust Act.

I.

Defendants, for lack of information, deny the allegations in Paragraph I of the complaint and call for strict proof, including proof of the fact that complainant is qualified to do business in the State of Louisiana.

II.

Defendants admit the allegation in Paragraph II of the complaint, but deny that the acts complained of are in violation of existing law.

III.

Defendants deny that this Court has jurisdiction based on diversity of citizenship. On the contrary, defendants aver that indispensable party plaintiffs in this suit are Louisiana citizens. The validity of the contracts relied upon here is at issue; all the contracting parties are therefore indispensable parties.

IV.

Defendants deny the allegations of Paragraph IV of the complaint, for lack of information, except that they admit that all of the products mentioned therein that are purchased from plaintiff for resale in Louisiana are purchased from and sold by plaintiff in interstate commerce.

V.

Defendants deny, for lack of information, the allegations in Paragraph V of the complaint and call for strict proof of the fact that the products and commodities therein

mentioned are in fair and open competition with products and commodities of the same general class produced by others.

VI.

The allegations of Paragraph VI require no admission or denial by defendants.

VII.

Defendants deny the allegations in Paragraph VII of the complaint, especially insofar as Louisiana is concerned.

VIII.

Defendants deny the allegations in Paragraph VIII of the complaint, insofar as Louisiana is concerned, except they admit that the laws referred to were enacted.

IX.

Defendants deny the allegations in Paragraph IX that the Louisiana Fair Trade Law was enacted to protect the consuming public against injurious and uneconomic practices. On the contrary, defendants avers that the so-called Fair Trade Law was pressured through the legislature by a few well-organized pressure groups of wholesalers and retailers for their own advantage; solely for the profit of inefficient and marginal merchants who could not survive in a competitive market, to the detriment of the public and of the efficient merchant who could prosper in a free and competitive market.

Defendants deny the validity of the contracts mentioned in Paragraph IX of the complaint. Defendants admit the receipt of the letter from plaintiff's New York office, dated November 14.

X.

Defendants deny the allegations of Paragraph X of the complaint, and particularly that they violated any existing law.

XI.

Defendants deny the allegations of Paragraph XI except with respect to the product known as Seagram's Seven Crown, which it admits it sold at the prices set forth in subparagraphs 1, 2, 3, and 4 of Paragraph IX of the complaint.

XII.

Defendants deny the statement made in Paragraph XII, particularly that defendants' acts have induced and forced other retail liquor dealers under contract with plaintiff to violate their contracts with plaintiff.

Defendants deny that the buying public is misled by virtue of reduced prices and allege on the contrary that such reduced prices benefit the public. Defendants deny that retailers cannot profitably market plaintiff's commodities expect at the price fixed by plaintiff. Defendants deny that the sale of plaintiff's product at a price below the established price will cause a destruction of plaintiff's business, and defendants deny that plaintiff is entitled to injunctive relief.

Wherefore, defendants prays that the complaint herein be dismissed at plaintiff's cost.

WISDOM AND STONE,
JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendants.
By SAUL STONE.

312 Whitney Building,
New Orleans, Louisiana.

MOTION TO DISMISS.

Filed Dec. 13, 1949.

(Number & Title Omitted.)

To the Honorable The United States District Court for the Eastern District of Louisiana, New Orleans Division:

The defendant moves the Court to dismiss the complaint for the following reasons:

1. The complaint fails to state a claim against defendant upon which relief can be granted. The contracts relied upon by plaintiff are null and void under the law of Louisiana in that the contracts lack mutuality for the reason that the plaintiff has incurred no obligation thereunder. In the alternative, if an obligation on the part of the plaintiff inferentially exists, such obligation is subject to purely potestative conditions.

2. Plaintiff has failed to join indispensable parties. Plaintiff predicates its complaint on contracts, the validity of which are at issue. The contracting dealers are therefore indispensable parties to the action.

WISDOM AND STONE,
JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendants,
By J. M. WISDOM.

312 Whitney Building,
New Orleans, Louisiana.

STIPULATION.

Filed: December 14, 1949.

(Number & Title Omitted.)

It Is Agreed between counsel that the testimony of the following witnesses, including any exhibits referred to and offered in evidence in connection therewith, as given in the case of Calvert Distillers Corporation V. Schwegmann Brothers et al., Civil Action No. 2607 of the docket of this Court, shall apply also to the case of Seagram-Distillers Corporation v. Schwegmann Brothers et al., Civil Action No. 2608 of the docket of this Court, to the full extent that it is relevant and material to the latter case, with Seagram-Distillers Corporation to have the benefit of all objections interposed by counsel on behalf of Calvert

Distillers Corporation during the taking of that testimony:

1. Thomas H. Schneideau.

2. Frederick W. Scharfenstein.

3. Marvin Levin.

It Is Further Agreed that if Frederick W. Scharfenstein were examined as a witness in the case of Seagram-Distillers Corporation v. Schwegmann Brothers et al., he would give substantially the same specific testimony as to Seagram products and price lists as he gave as to Calvert products and price lists in his testimony, and, for the purpose of the application of his testimony to the Seagram case, his testimony should be construed as enlarged to that extent by this agreement.

It Is Further Agreed that the testimony of the following witnesses, including any exhibits referred to and offered in evidence in connection therewith given in the Calvert case shall be considered in the Seagram case only insofar as their testimony, if presented at the trial of the Seagram case, would be admissible and received in evidence against objections of irrelevancy and immateriality in the Seagram case:

1. Anthony Bologna.

2. Harold Bevan.

3. John Schwegmann, Jr.

It Is Further Agreed that the testimony of Henry W. McGuire, including any exhibits referred to and offered in evidence in connection therewith, given in the Calvert case shall be considered in the Seagram case only insofar as his testimony, if presented in the trial of the Seagram case, would be admissible and received in evidence against objections of irrelevancy and immateriality in the Seagram case, but counsel for plaintiff in the Seagram case contend that not part of his testimony in the Calvert case is relevant or material to the Seagram case, and make this stipulation with reservation of all of their said objections of irrelevancy and immateriality in the Seagram case to all of his testimony in the Calvert case.

It Is Further Agreed that attached fair trade contracts were entered into by Seagram-Distillers Corporation on November 10, 1949, with

1. Brass Rail.

2. L & A Wine Cellar.

3. Broadway Liquor Store.

4. Jackson Bar.

and that attached fair trade contracts were entered into by Seagram-Distillers Corporation on November 11, 1949, with

5. Cuban Liquor Co., Inc.

6. A. B. C. Liquor Company.

It Is Further Stipulated that on March 22, 1948, the attached contract was entered into between Seagram-Distillers Corporation and Frederick W. Scharfenstein, doing business as Continent Wine & Liquor Co., and contracts in similar form were entered into on various dates between that date and June 22, 1948, by Seagram Distillers Corporation with various other retail liquor dealers. Name and dates of contracts will be shown on list to be furnished and filed.

It Is Further Stipulated that the B & W Package Liquor Store, Canal at Broad Streets, New Orleans, Louisiana, advertised in the Times-Picayune on Thursday, November 10, 1949, Seagram's 7 Crown whiskey at $3.64 a fifth-gallon, and that Katz and Besthoff, New Orleans, Louisiana, advertised Seagram's 7 Crown whiskey in the Times-Picayune on Friday, November 11, 1949, at $3.51 a fifth-gallon, as shown by the attached copies of the newspaper pages containing these ads.

December 14, 1949.

(S.) MONROE & LEMANN,
(S.) ROBERT G. POLACK,
(S.) WALTER J. SUTHON, JR.,
Attorneys for Plaintiff.
(S.) WISDOM & STONE,
(S.) JOHN MINOR WISDOM,
(S.) SAUL STONE,
Attorneys for Defendants.

(Number & Title Omitted.)

Proceedings Had in open Court before Honorable J. Skelly Wright, Judge, United States District Court

for the Eastern District of Louisiana, in the above entitled and numbered cause, on December 14, 1949, at New Orleans, Louisiana.

Appearances:

Messrs Wisdom & Stone, (John Minor Wisdom, Saul Stone, Esqs.), Attorneys for Defendants.

Messrs Monroe & Lemann, (Walter J. Suthon, Jr., esq.), Robert G. Polack, Esq., Attorneys for Plaintiff.

Mr. Stone:

We met this morning, as Your Honor suggested yesterday and we all agreed to try and consolidate this matter and agree upon as much testimony as we could that would be applicable in both the Calvert and Seagram cases against Schwegmann Brothers. We went over the testimony of some six witnesses and we agreed to cetrain limits as to the extent of the materiality of the testimony given by those witnesses that would be applicable in the Seagram case. We have dictated it to a stenographer and it has been typewritten. We do have several witnesses upon whom we cannot agree, so we thought the most expeditious way to handle it would be to present those witnesses to Your Honor.

The Court:

Proceed.

Offer: Mr. Suthon:

On behalf of the plaintiff in this case, we offer in evidence the exhibits attached to the complaint, the

affidavits and stipulation, and the same note of evidence we presented in the other case.

Mr. Stone:

We might point out to Your Honor we also agree that the exhibits filed on the Calvert case apply in so far as they pertain to the Seagram case, also the exhibits attached to the stipulation to have the same effect as if they were offered in evidence before Your Honor; the newspaper clippings pertaining to Seagram during that particular period.

Now we have the motion that we presented. We are filing the same motion and our Answer as well, in this case. I don't know whether it is in the record as yet, but we do have it.

The Court:

That has not been filed.

* * * * * * * *

Mr. Stone:

We have the motion to dismiss the Seagram case. We also have the Answer. The Answer is substantially the same with very slight variations. We are not raising in the Seagram case the question of defense predicated upon the previous motions.

Mr. Suthon:

I have stipulated it, and it has been dictated and transmitted as far as possible, making the testimony in the Calvert case apply in so far as material in the Schwegmann Brothers case. Counsel has not had chance to read it. I will read it to the Court.

The Court:

Suppose you read it.

Mr. Suthon:

(Counsel reading stipulation to the Court). I find this stipulation is in order and I am willing to file it.

Mr. Stone:

I think it is exactly as we agreed on when in conference this morning.

Mr. Suthon:

We dictated it together and it came out exactly as I thought it would.

Mr. Stone:

I will sign it.

The Court:

Let the Motion to dismiss be taken under advisement along with the other Motions. Let the stipulation be filed.

Mr. Suthon:

The seven contracts, exhibits attached to the stipulation just presented and filed and offered in evidence by the plaintiff, are marked respectively exhibits Seagram-1 to Seagram-7, both inclusive.

* * * * * * * * * *

The Court:

I take it the plaintiff rests.

Mr. Suthon:

Plaintiff rests, Your Honor.

TESTIMONY ON BEHALF OF DEFENDANTS:

SIDNEY E. RUDMAN: Witness, being duly sworn on behalf of defendants, was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. Sidney E. Rudman.

Q. What is your occupation, Mr. Rudman?

A. District Sales Supervisor for Seagram Distillers Corporation.

Q. Where is your office located?

A. 440 Canal Building.

Q. As the District Sales Supervisor for Seagram Distillers Corporation, what exactly is your function in the State of Louisiana for Seagram Distillers Corporation?

A. Well, I supervise the sales of our products through our wholesale houses and supervise the activities in our State.

Q. Do you have any other States under your jurisdiction?

A. Arkansas and Tennessee.

Q. Do you have a State Manager in the city of New Orleans for the State of Louisiana?

A. We have.

Q. What is his name?

A. Howard C. Upton.

Q. He is presently ill?

A. He has been for some months.

Q. And you are filling in, doing his work for the State of Louisiana?

A. That's right.

Q. How long have you been with Seagram Distillers Corporation?

A. Six years.

Q. How long have you been acting as manager for the State of Louisiana?

A. Approximately six months.

Q. Were you in the State of Louisiana when—did you have anything at all to do with the Seagram Distillers Corporation operations in Louisiana before Act No. 360 went into effect?

A. Yes, in the Northern part of the State.

Q. You were then working for Seagram Distillers Corporation in New Orleans?

A. I was working out of New Orleans.

* * * * * * * *

Q. Where is Seagram Distillers Corporation domiciled. Do you know that?

A. Our main office?

Q. Yes.

A. New York City.

Q. You are employed by the main office in New York City to operate and function in Louisiana?

A. That's right.

Q. Would you explain to the Court the procedure that Seagram Distillers Corporation goes through when it effects the sale of its merchandise to a Louisiana purchaser?

A. By purchaser you mean retailer?

Q. Whichever you sell to?

A. Seagram Distillers Corporation sells direct to our wholesalers.

Q. That is a purchaser?

A. In New Orleans market our wholesaler is the Magnolia Liquor Company. We solicit our orders from Magnolia and place those orders with the New York office and arrange for shipment from our plant.

Q. Your plant then ships the merchandise direct to Magnolia Liquor Company?

A. That's correct.

Q. How many wholesalers do you have in the State of Louisiana?

A. Four.

Q. Who are they?

A. Magnolia Liquor Company, New Orleans; Magnolia Liquor Company, Lafayette, Louisiana, Blue Grass Liquor Company, Shreveport, Louisiana and Blue Grass Liquor Company in Monroe, Louisiana.

Q. There are no other authorized wholesalers of Seagram products in New Orleans?

A. Not for direct shipment.

Q. Any other dealers to get shipments, they would have to get it through some other source than Seagram Distillers Corporation?

A. That's correct.

Q. Does Seagram Distillers Corporation maintain or have any salesmen in the State of Louisiana, particularly in New Orleans, who call on the retail trade in New Orleans?

A. Some distillers call their men salesmen. We call our men sales promoters or regional representatives.

Q. Will you explain to the Court exactly what those regional representatives do when they call on the trade in New Orleans?

A. The function of our representatives are more or less for advertising purposes and sales promotion only. They will contact the retailer and ask them to

have a window display of Seagram, arrange for a betted position of our merchandise on their counters and in their stores.

Q. Do any of your regional representatives ever go out with salesmen for Magnolia Liquor Company when the salesmen for Magnolia Liquor Company are soliciting business for Magnolia on Seagram products?

A. Yes, they do.

Q. They frequently do that?

A. Yes, Sir.

Q. And they try, as I understand it, and as you indicated earlier today, they try to encourage the sales from the wholesalers to the retailers of Seagram products?

A. That' right. And from the retailers to the consumer.

Q. Now you, on behalf of Seagram Distillers, entered into these six contracts with Louisiana or New Orleans retailers that are dated November Tenth and Eleventh, which were offered in evidence by your attorney?

A. That's right.

Q. In each instance you represented the Seagram Distillers?

A. That's right.

Q. The dates that appear on those contracts are November Tenth and Eleventh. Are those the actual dates that the contracts were entered into?

A. November Tenth was a Wednesday—yes, those are the exact dates.

Q. Did you go out with those contracts to those retailers and have them sign the contracts in your presence?

A. No, Sir, I did not.

Q. So you don't know what date those retailers may have signed the contracts?

A. I know those contracts were signed on that date, because our New Orleans manager for Seagram Distillers had them signed with the exception of one in Shreveport, and that is my signature on them.

Q. So those contracts must have been signed on or before November Eleventh by both parties?

A. They were signed on that date.

Q. Does Seagram Distillers maintain the same resale prices at retail level on those products, making allowance for local freight and freight rates throughout the United States?

A. To the best of my knowledge, absolutely.

Q. Do you, or does anyone in the Louisiana office have anything at all to say with respect to the fixing of the prices in Louisiana on those products?

A. I have to work out price formulae on our products in Louisiana, based on the formula of fifteen percent profit to the wholesaler, exclusive of Federal tax and 33-1/3 percent, exclusive of Federal tax, to the retailer.

Q. You say you work out that formula after arriving at a price. What did you have to do with fixing the base price that that formula was predicated on?

A. Our base price has been the same for many, many years as long as I have been with Seagram.

Q. The base price on each product has been the same?

A. That's correct.

Q. You never changed the content of the product?

A. Never changed in ten years.

Q. You never changed when your product was known as Seagram 7 Crown, with a larger content of old whiskeys or a lower content of old whiskeys?

A. That has nothing to do with the blends.

Q. But you never changed the contents of your products?

A. No, Sir.

Q. When you say that you had something to do with the fixing of this formula that you suggested, how would you go about in establishing prices with that formula? Would you tell the Seagram Distillers in New York, by whom you were employed, that that would be the price, or merely suggested it, or what?

A. No. We work on what the best trade price is and based on the formula, submit prices to our New York office, and they okay them and then send us the official price list.

Q. New York actually fixes the price?

A. They confirm it.

Q. They actually fix the price?

A. Yes, Sir.

Q. Did you enter into any Seagram Distillers contracts in New Orleans without being authorized by New York to do so?

A. Certainly not.

Q. Where are most of the Seagram whiskeys handled with Seagram Distillers in Louisiana?

A. Lawrenceburg, Indiana.

Q. I believe I understood you to say you would send an order to New York when you got it and the New York office would ship it to Magnolia, or your wholesaler in Louisiana?

A. Yes, Sir.

Q. From what point do they ship the whiskeys?

A. Lawrenceburg, Indiana.

Q. Does Seagram Distillers handle any stocks of whiskeys at all in the State of Louisiana?

A. No, Sir.

By Mr. Wisdom:

Q. Did I understand you to say you had a New Orleans manager?

A. Yes, Sir.

Q. And you are his boss?

A. That's right.

Q. Do I understand you to say that you are then in control of Louisiana, Arkansas and Tennessee, they are within your jurisdiction?

A. Yes, Sir.

Q. To whom do you report?

A. Harry C. Fischel.

Q. What is his capacity with the company?

A. Southern Division Manager.

Q. He is the Southern Division Manager for Seagram Distillers?

A. That's correct.

Q. Can you tell me what States are within his territory?

A. Florida, Georgia, South Carolina, Louisiana, Tennessee, Arkansas, Texas and Kansas.

Q. Can you tell me to whom he reports?

A. Yes, Sir. He has several bosses, Victor Fischel.

Q. Where is his office?

A. Chrysler Building, New York.

Q. And he is with Seagram Distributors head office in New York?

A. That's right.

Q. Can you tell me whether Seagram Distillers is a subsidiary of any other company, based on your own knowledge?

Mr. Suthon:

Who are you referring to by Seagram Distillers, you mean the plaintiff in this case, Seagram Distillers Corporation?

Mr. Wisdom:

So far we are talking about Seagram Distillers Corpporation.

Q. Is that correct?

A. Yes, Sir.

Q. So far this is Seagram Distillers Corporation. Paragraph-4 of plaintiff's petition states that Seagram Distillers Corporation is a wholly owned subsidiary of Joseph E. Seagram & Sons, Inc. Can you tell me whether you know if Joseph E. Seagram & Sons is a subsidiary of any other corporation?

Objection: Mr. Suthon:

We object as not relevant or material to this case. We do allege in the complaint that Seagram Distillers Corporation is a subsidiary of Joseph E. Seagram & Sons, Inc., an Indiana corporation which owns Seagram Distillers Corporation, and authorized to make contracts, and I say this is not material or relevant to any pleading in the Answer.

Mr. Wisdom:

One of our defenses is the act of the plaintiff was in violation of the Anti-Trust Act. It is our contention that they have one operation directed through

the State of Louisiana, and we want to show it directed not only by the office of Seagram in New York—

Mr. Suthon:

It is alleged in the case there is no local manufacture, no local stock, that whenever anything is ordered here, the order goes to New York and it is filled by the department from Indiana to New Orleans.

The Court:

I sustain the objection.

By Mr. Wisdom:

Q. Can you tell me whether the contracts you issued in Arkansas and Tennessee are identical, or substantially similar to the contracts issued in Louisiana?

Objection: Mr. Suthon:

We object as not relevant or material to any issue in this case. We are trying here the fair trade prices of Louisiana, Tennessee and Arkansas.

Mr. Wisdom:

We want to show that it is nationwide. For example, in the Franklin Distillers case it was pointed out they had one type of contract throughout the country. Franklin Distillers is a subsidiary of Joseph E. Seagram & Sons, Inc. just as Seagram Distillers Corporation.

The Court:

Suppose you ask the question whether or not this same contract was used in other States by Seagram.

I would make no objection to that question.

Mr. Wisdom:

I intended to ask that question.

Q. Mr. Rudman, is the same contract issued by Seagram in other States?

A. I believe so. I am not definitely certain whether any changes in that clause.

Q. You are familiar with the contract issued in Tennessee?

A. Yes, Sir.

Q. Are they the same?

A. Seems that way to me.

* * * * * * * *

MANFRED WILLMER: Witness, being duly sworn on behalf of defendants was examined and testified as follows.

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. Manfred Willmer.

Q. You are employed by the Magnolia Liquor Company?

A. Yes, Sir.

Q. In what capacity are you employed?

A. Sales Manager.

Q. How long have you been with the Magnolia Liquor Company?

A. I have been with the Magnolia Liquor Company since 1947, but I have been Sales Manager for approximately six weeks.

Q. You were with the Magnolia Liquor Company then during the four months preceding the effective date of the Louisiana Mandatory Liquor Law in July, 1948?

A. Yes, Sir.

Q. At that time what were you doing for Magnolia Liquor Company?

A. At that time I was acting more or less as a sales supervisor.

Q. You are familiar with the situation that prevailed in the city of New Orleans with respect to the sales of whiskeys during that period immediately preceding July 27 or 28, 1948, are you not?

A. Yes, Sir.

* * * * * * * *

Q. Do you know whether or not Seagram products were being sold generally throughout the city of New Orleans and this area for less than the fair traded price in effect at that time?

A. I am not cetrain as to what the fair trade prices were in effect at that time and at what time those fair trade prices went into effect. I do know that Seagram was sold for less at that time.

* * * * * * * *

Q. How do you know that?

A. I saw the Newspaper advertisements and saw the prices.

Q. You were familiar with Seagram prices that had been maintained by the Seagram Distillers Corporation?

A. I do know some contracts that were entered into somewhere along that time, but as to the exact dates those contracts were entered into I don't know.

Q. Do you recall about when those ads appeared that you saw in the Newspapers you just referred to?

A. Prior to the passage of Act 360; more or less ads appearing in the Newspapers in some degree of regularity.

Q. Would that be three months prior to Act 360?

A. Yes. I don't think anybody would deny it.

* * * * * * * *

By Mr. Stone:

Q. When you were acting as sales supervisor during that period in 1948, did you ever go out with any Seagram representatives to call on the trade?

A. I am sure I must have, yes.

Q. Was it a common practice for a Seagram representative to accompany a Magnolia representative when calling on the retail trade?

A. Yes, Sir.

Q. You are familiar with what is meant by the term "Deal" in the liquor industry in this area, are you not?

A. I have my own understanding of it.

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Q. Will you explain to the Court what a deal is?

A. My own understanding of a deal is some sort of transaction that guys go in and bargain with the retailer. He may not know exactly what he is going to offer the retailer and the retailer may not know the exact terms he is going to apply. A deal is arrived at by two persons or more.

Q. Is that what is understood by a deal in this area?

A. To the best of my knowledge that is the way I regard it, as such.

Q. Would you regard a transaction a deal if a representative of a wholesaler went to a retailer and

out bargained him over a discount of $2.50 a case for 25 cases?

A. I consider that a quantity deal.

Q. That is not a deal?

A. No, Sir.

Q. It hasn't been looked upon as a deal?

A. I can't answer what other people think.

Q. Do you know any quantity discounts Seagram gave during that period preceding July, 1948?

A. To the best of my knowledge Seagram has never participated in any deals prior to that time or since that time.

Q. How about Magnolia?

A. Prior to Act 360 Magnolia had discounts on quantity.

* * * * * * *

Q. When Magnolia gave a quantity discount, do you know whether or not it was given—that was before Act 360—

A. Yes, Sir.

Q. —with any idea that the retailer in turn would correspondingly lower the price at the consumer's level?

Objection: Mr. Suthon:

We object as a conclusion.

The Court:

I think Counsel has the right to bring out what this witness' purpose was in giving the quantity discounts. If you can phrase your question so as to bring that out, it will be admissible.

By Mr. Stone:

Q. Do you know whether or not, when quantity discounts were given to retailers, it was done in order to permit the retailer to correspondingly reduce the prices at the consumer's level of that product?

A. That was never our purpose.

Q. What was your purpose?

A. Our purpose was to sell more merchandise.

Q. Was that purpose restricted to the fact that you wanted the retailer to make more money?

A. No, Sir. The purpose in offering quantity discounts is (a), to sell more merchandise, and (b), based on the fact that the quantity purchase is cheaper. It is cheaper to serve quantity purchases, therefore, in the trade generally he is entitled to some consideration.

Q. Don't you know, as a matter of fact, that most of the retailers who made quantity savings, passed those savings on to the customer?

A. I know many retailers in quantity discounts reduced prices.

Q. Isn't that the same?

A. No. When I went in the liquor business I found that prices had already been cut. So far as I could see, the merchandise I sold or participated in selling, had absolutely no effect in either raising or lowering prices. Prices were already gone. When I went into the liquor business prices had already been reduced.

Q. By reduced, you mean less than the fair trade prices?

A. Less than the OPA prices.

Q. That was true with reference to Seagram products as well as the others you testified to?

A. Yes, Sir.

Q. And you went into the liquor business in 1947?

A. Yes, Sir.

Q. What month was that?

A. July, 1947.

Q. Did you as sales supervisor of Magnolia have anything to do with the fixing of prices at the retail level on Seagram products?

A. I don't quite understand that question.

Q. Seagram 7 Crown is now selling at the fair trade price of $4.24. Is that correct?

A. Yes, Sir.

Q. Did you have anything to do as sales supervisor of Magnolia in this area, did you have anything to do with fixing the price at $4.24, at the retail level?

A. No, Sir.

Q. Do you know whether or not Magnolia had anything to do with the fixing?

A. No, Sir.

Q. Do you know who fixed that price?

A. I suppose Seagram did. I don't know.

Q. All you do is carry out that price?

A. I don't know what you mean by carrying out.

Q. Do you have any conversation with your retailers as to prices they sell Seagram for?

A. Are you talking about now?

Q. Now, Yes.

A. Yes, definitely.

Q. And that price they give you of $4.24 is the price they tell you that you have to sell it for?

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MALCOLM WOLDENBERG: Witness, being duly sworn on behalf of defendants was examined and testified as follows.

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. Malcolm Woldenberg.

Q. You are connected with the Magnolia Liquor Company in New Orleans?

A. Yes, Sir.

Q. In what capacity?

A. Vice-President.

Q. You are one of the stockholders as well, in that corporation?

A. Yes, Sir.

Q. You are also connected with the Magnolia Liquor Company in Lafayette, Louisiana?

A. Yes, Sir.

Q. Is this the same Magnolia Liquor Company that has the exclusive distribution for Seagram in this area?

A. Yes, Sir.

Q. From whom does Magnolia Liquor Company puschase their Seagram products that it distributes in this area?

A. The Seagram Distillers Corporation.

Q. Do you have the exclusive right to sell Seagram products in this area, or do you share that with anyone else?

A. We have the exclusive right at wholesale level.

Q. You know that this suit has been brought against Schwegmann Brothers for a violation of the

fair trade contract and that the suit is being defended, do you not?

A. I do.

Q. Now did you have anything to do with the prices that have been established on the resale of Seagram products in this area?

A. No, Sir.

Q. Do you take instructions entirely from Seagram Distillers with respect to the advice that you are to give the retail trade as to what prices the Seagram products are to be sold for at retail level?

A. Seagram sets the price at which the merchandise is to be sold at retail level. We are given those prices by Seagram Company. Under the Fair Trade Act those prices have been established and put out by Seagram with request that the merchandise be sold at those prices, and we tell them to sell at those prices.

Q. You are not charged with the enforcement of prices?

A. No, Sir.

Q. Are you familiar with the general situation that existed in Louisiana during the 3 or 4 months preceding the mandatory effective date of Act 360?

A. Not so well, 2 or 3 months previous to the act anyway—I don't remember the number of it, I spent very little time in New Orleans.

Q. Weren't you spending your time with Magnolia?

A. No, up in Wisconsin.

Q. You were familiar with what was going on?

A. I knew what was going on with respect to the mandatory State act.

Q. Do you know whether or not Seagram products were being sold at retail level for less price in New Orleans before Act No. 360 became effective?

A. Yes. I know they were not being sold for $4.24.

Q. You know they were sold at less than that during that period?

A. Yes, Sir.

Q. You didn't have anything to do with enforcing the $4.24 price at that time, did you?

A. I wasn't here very much.

Q. When I say you, I mean the Magnolia Liquor Company?

A. I don't believe very much was done by Magnolia in that respect.

Q. You are familiar with what is commonly called a deal in the whiskey trade in this area, are you not?

A. I am.

Q. Prior to July 27 or 28, 1948 when Act 360 became effective, did Seagram company give any deals to its retailers in this area?

A. No, Sir.

Q. Did Magnolia give any deals to retailers in this area?

A. Yes, Sir.

* * * * * * * *

Q. Do you know whether or not the retailers in this area to whom Magnolia gave discounts on Seagram products, passed those discounts on to the consumer, or retained that additional profit for themselves?

A. I know that some of them passed—I know some of them sold at lower prices than the suggested retail price and some of them did not.

Q. Nothing was done to any of those who sold at a lower price?

A. Not that I know of.

Q. When you say suggested prices, you mean the fair trade prices?

A. Yes, fair trade prices.

Mr. Stone:

I have no further questions.

Cross Examination.

By Mr. Suthon:

Q. You were asked something about a deal, as that term was used, in the liquor trade?

A. Yes, Sir.

Q. What was your understanding as to that word "deal" that you were asked about?

A. I suppose it means a price lesser than our regular retail prices to the consumer. I believe the price for Seagram 7 Crown, the retailer's price is $39.75 a case.

Q. Price from who to who?

A. Retail cost from us. That is our regular mark-up. We sold at $39.75 or $39.76 a case. I presume what was meant by a deal, we gave a discount off of that price for quantity purchases, on 25 case lots give a discount of $5.00 a case prior to the Mandatory Fair Trade Act in Louisiana.

Q. In what year was that?

A. 1948, I believe, before the act went into effect. I think the act went in effect in September or August.

Mr. Stone:

July.

A. (Witness continuing). Before that time we had a discount of $2.00 a case to retailers in 25 case purchases.

By Mr. Suthon:

Q. Was that discount available to any retailer who wanted to buy your product?

A. Yes, it was available to any retailer who wanted to buy our product. It was offered to the trade generally. All of our salesmen had that price to offer to the trade.

Q. Is that what you referred to as a deal in testifying as to the word "deal"?

A. That is what I understood.

Q. Did Seagram Distillers Corporation bear any part of that discount in deals between Magnolia and its retail customers?

A. No, Sir. Seagram Distillers Corporation never had a discount on their merchandise since we have been in business, or handling their line.

Q. How long has that been?

A. May, 1944 when we entered bussines. They have never given us a discount, nor have they in any way contributed to any rebates or discounts in depletion, so to speak, of merchandise in the warehouses.

Q. All these discounts you gave since 1944 that you testified to, Magnolia carried on its own?

A. Every discount we gave came from our profits.

Mr. Suthon:
That is all.

Mr. Stone:
That is all.

(Five minute recess).

JOHN SCHWEGMANN, JR., Witness being duly sworn on behalf of himself, was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. John Schwegmann, Jr.

Q. You are one of the defendants in this proceeding brought by Seagram Distillers Corporation for an injunction against the partnership known as Schwegmann Brothers?

A. That is correct.

Q. Mr. Schwegmann, you are charged with having sold Seagram 7 Crown on November 21, 1949 for $3.62 including the sales tax. You made that sale at your place of business?

A. No doubt I made the sale.

Q. You sold Seagram 7 Crown at that time for less than the fair trade price?

A. Yes, Sir.

Q. Did you buy that Seagram 7 Crown that you sold at a deal that has been referred to, as defined in this case.

A. No, Sir, I didn't get any deal from Seagram or from Magnolia.

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Q. Now Mr. Schwegmann, before Act 360 went into effect in July, 1948 you purchased Seagram whiskies on deals, did you not?

A. Yes, Sir.

Q. Now when you would purchase Seagram products on deals in that period, would you pass those

savings on to your consumers, or would you continue to sell Seagram products at the same price?

Objection: Mr. Suthon:
I object as not relevant or material.

The Court:
Counsel is trying to establish some connection between deals and fair trade prices. Objection overruled.

A. In that case where we got merchandise free or on discount, whichever way you want to put it, it amounts to the same thing because it was something other than the price, I took that merchandise and passed it on to the customers. If I bought 110 cases and I got a discount of $10.00 or more, I would divide that and make it a little cheaper to our consumers.

* * * * * * * * *

Q. Do you know what the retail price was that generally prevailed in New Orleans on Seagram 7 Crown immediately preceding the effective date of Act 360?

A. It was probably the price—I don't remember exactly—at which I had been selling in this particular case, or lower. Immediately before, all liquor men urged us to buy plenty of liquor because of the new law taking place, because it was your last chance. That was more or less the tactics they used on me.

Objection: Mr. Suthon:
I object to the testimony as to all distillers.

The Witness:
Well, Seagram.

By Mr. Stone:
Were you told by a Seagram representative or Magnolia?

A. Yes, Sir. I take that back. In many cases both of them were there.

Q. Were you frequently called on by representatives of Seagram Distillers Corporation during that period?

A. I don't know how frequent. Occasionally they came in. At times they came in with representatives.

Q. Do you know whether, when any of them came in, you were offered deals?

A. Yes, in many cases they were in when deals were offered.

Q. At that time did they warn you about selling Seagram products for less than the fair trade price?

A. To the countrary, I warned them. I told them it would be impossible to buy all this liquor in event this Act would be passed, what was the use for me to buy all this liquor. I actually took the reverse. In many instances I discouraged the buying of that liquor because of this new Act.

Q. Now since Tuesday a week ago when this case was continued, have you maintained prices on Seagram products?

A. You know my word. I told you about that agreement. Over the phone I asked you would this be effective immediately on Tuesday and you said you would ring me back, and you rang me back and told me

Tuesday, so we started last Tuesday, not yesterday but the Tuesday before.

Q. And you are still maintaining fair trade prices on it?

A. Yes, sir.

Cross Examination.

By Mr. Suthon:

Q. What do you mean by a deal, you were talking about buying liquor at deals?

A. I am going to answer that question like this. I have had all kinds of deals. I had them where they sent merchandise without a bill and I had to mark it on a piece of paper, because the Alcohol Tax Unit instructed me when I first went in the business, if they gave you liquor and they didn't give it to you on a bill, you make your own bill and file it. If we have gotten a discount we mark it at the bottom where it says "Discount". I list the cases and we have to figure out the discount and apply that to exactly what we get it for. Sometimes we have more than one kind of product on the invoice, so we have to find out how this money came to us.

Q. That would be discount on quantity purchases?

A. I presume it would in that particular case.

Q. Is that the kind of deal you were talking about when you said you bought Seagram liquor before Act No. 360 became effective?

A. Yes, Sir, before Act 360.

Q. That is what I am talking about?

A. Yes, Sir.

Q. In the 3 or 4 months before the time when Act 360 went into effect in July, 1948 can you give us the name of any representative of Seagram, not some re-

presentative of Magnolia but a representative of Seagram who called on you and asked you to. buy liquor—.

A. No, Sir, I don't know them by name. I am bad on remembering names. He introduced Mister So and So and their names would be the things I wouldn't try to remember any more.

Q. The man that came in, you would know would be a Magnolia man?

A. Oh, Yes, I would know the Magnolia man.

Q. You can't give us the name of any Seagram men that called on you in this period before July, 1948 when this Act went into effect, who urged you to buy large quantities of liquors?

A. No, Sir, I don't know the names. I don't say they urged me what to sell it for. Nobody told me what to sell it for. I said this act is right around the corner, what will I do with it.

Mr. Suthon:
That is all.

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Rebuttal Testimony.

MALCOLM WOLDENBERG, Witness being duly sworn on behalf of plaintiff, was examined and testified as follows:

Direct Examination.

Q. Please state your name?

A. Malcolm Woldenberg.

Q. Mr. Woldenberg, there is offered in evidence a sheet from the Times-Picayune of Friday, November

11, 1949, marked as: "Stipulation Exhibit-6" which contains an advertisement by Katz & Besthoff showing a price of $3.51 for a fifth of a gallon of Seagram 7 Crown. Did that advertisement come to your attention around the time it was advertised or shortly thereafter?

A. Yes, Sir.

Q. About how close would you say it was in point of days?

A. I would say four or five days.

Q. When hat advertisement came to your attention did you have any contact with Katz & Besthoff on the subject, and if so, what?

A. When it came to our attention I went down to see Katz & Besthoff and saw Mr. Chapital and told him it was Seagram's policy to enforce fair trade prices wherever they could legally, and ask him how he felt about fair trade and he told me he was very much in favor of fair trade.

* * * * * * * *

Q. Have you been back to see Mr. Chapital since that ad appeared in the Paper?

A. No, I have not.

By Mr. Suthon:

Q. Did you keep in touch with prices after your visit with Mr. Chapital with reference to Katz & Besthoff?

A. Yes, sir.

Q. What did you find after that visit as to the prices?

A. I found them selling it at $4.24, the fair trade price, in one or two stores. I didn't check all of the stores.

Q. In checking the Katz & Besthoff prices on Seagram when you visited Mr. Chapital, was that price of $4.24 the only price you found on that particular whiskey?

A. That is the only price I found them selling it at.

Q. Now in addition to your visit to Mr. Chapital, about which you testified, at Katz & Besthoff, did you make any visits to sellers at retail, making similiar ads of Seagram whiskey at that time?

A. Yes. I called on Mr. Schwegmann, I called on Soliari and Walgreen Drug Store. I remember those definitely.

Q. And what did you inform those gentlemen when you called on them on the occasion of this liquor price advertisement?

A. I told them Seagram's policy was to maintain fair trade prices.

Q. Who did you talk to at Solari's?

A. At Solari's I talked to the clerk behind the counter.

* * * * * * * *

Q. Was this Mr. Schwegmann here the man you talked to? (Indicating.)

A. Yes, this Mr. Schwegmann.

Q. What was your conversation with him?

A. My conversation with him was the same conversation, that Seagram policy was to maintain fair trade prices.

Q. What was his response to that?

A. His response was he had no quarrel with what Seagram wanted to do, but that he had been running his business for years and been successful and he intended to run his business the way he wanted to run it.

Q. Now after your visit to Walgreen's and Solari's on the occasion of these prices, did you not after that see the prices they were offering Seagram at?

A. Yes, Sir.

Q. This particular Seagram 7 Crown fifths?

A. Yes, Sir.

Q. What was it after you visit to Solari's?

A. $4.24 a fifth.

Q. And at Walgreen's?

A. $4.24.

Q. Did you call on any other stores besides those you mentioned around that time?

A. I called on B & W Liquor Store at Canal and Board.

Q. I show you in that connection an ad of the B. & W. Liquor Store, offered in evidence in this case, of the Times Picayune of November 10, 1949. "Defendants Stipulated Exhibit-1", showing an advertisement of Seagram 7 Crown, $3.64 a pint. Was that the ad that occasioned your call?

A. Yes, this is the ad all right. It was the first one that appeared.

Q. What statement did you make, or who did you see at the B & W Liquor Store?

A. Emile Bruno, the owner.

Q. And what statement did you make to him as the reason for your call?

A. Same as I made the others, that Seagram maintained fair trade prices on their products and would like for them to do the same.

Q. After that visit did you take note of what B & W Liquor Store was offering Seagram 7 Crown fifths for?

A. No, I didn't get back in the store.

Mr. Suthon:

That is all.

Cross Examination.

By Mr. Stone:

Q. Didn't you say a short while ago when you were on the stand as a witness called by the defendants, that you were not charged with the enforcement of fair trade for Seagram?

A. Yes, I think I did.

Q. How did you happen to go out and do the policing for Seagram in this particular case that you referred to in your direct testimony?

A. Well, I didn't go out to do the policing. I want to see these customers to sell them merchandise. I went up to see Mr. Chapital to find out how they felt about fair trade.

Q. Didn't you say you saw ads in the Papers and you went out to see them and talk to them and said Seagram maintained fair trade prices on these products?

A. Will you say that again?

Q. I want to know why you went out to do the policing you referred to, after you stated you were not charged with the enforcement of that Statute and it was a function of Seagram to enforce fair trade prices and not Magnolia. I want to know why you went out to do the policing?

A. I didn't go out to do any policing. I went to Chapital four, five or six days after. My man and I were together. It is a routine call and I wanted to go over with him. We went into Katz & Besthoff and I talked to Chapital and talked about fair trade prices.

Q. You mean you went there, not because of that ad that he had run?

A. That's right. It was not because of the ad that I went there.

Q. How did you happen to go to B & W what you referred to?

A. I went to the B & W because we felt we were not getting enough business from them.

Q. And that ad that happened to run was a coincidence?

A. That ad was run a few days before. I don't call on the trade generally, personally I don't call on the trade.

Q. I understand you don't, you said you didn't. You are not charged with the enforcement of fair trade, that is the function of Seagram Distillers and that is why I am

asking you now why you had to do the policing those few days and I think I am entitled to an answer?

A. I am trying to answer your question. The B & W had this ad. I didn't go there because of the ad, maybe my subconscious mind.

Q. Was it purely a coincidence that you happened to go four or five days later when they were selling for less than the fair trade price?

A. No. Walgreen wasn't selling for less than the fair trade price.

Q. Was the reason you went to Schwegmann to sell him some merchandise?

A. Partly.

Q. Did you offer him some merchandise the day you called on him?

A. I don't recall that we did.

Q. Didn't you actually refuse to sell Schwegmann any merchandise that day that you called on him?

A. I don't know.

Q. You don't remember that?

A. I don't remember.

Q. I ask you whether or not the day you went to see Schwegmann that you say Schwegmann talked about running his business the way he wanted to, didn't you actually refuse to sell him Seagram goods that day?

A. I might have, I am not sure.

Q. You said you were not policing, it was not your job to enforce fair trade, that was the function of Seagram. You said you happened to go to places that advertised, Walgreen's that didn't, looking for business, you happened to go to Schwegmann's, you were not policing him, but you very likely refused to sell him.

A. When we went out that way we went to call on Mr. Papania.

Q. You went out there because of the ads showing the various low prices on Seagram. Did you go in there for the purpose of policing or not?

A. I would say yes, when we went in to see Mr. Papania.

Q. Then you did go in for the purpose of policing?

A. We were policing for orders. The price of $3.09 was a cut price.

Q. Weren't you policing all of them?

A. No, I didn't go with that idea.

Q. Did you police Mr. Papania?

A. I went to talk to him about it.

Q. Did you go in to sell him, or to talk to him about the price of $3.09?

A. We went in to talk to him about the price of $3.09.

Q. Then you did police Mr. Papania. You went there to try and up his price on Seagram?

A. Yes, sir.

Q. When you make the statement that you were not policing for Seagram, you are making an incorrect statement?

A. I don't think so. I am not trying to make an incorrect statement. I don't know what you are driving at. I went out to sell them to take the regular profit. I thought they didn't make enough profit.

Q. You were going to give your views on an economical price maintenance.

A. Yes, sir.

Q. You weren't going there to sell them goods?

A. I have other lines of merchandise.

Q. But you weren't going there to sell them Seagram's products?

A. No, sir.

Q. You weren't going to sell Katz & Besthoff Seagram's products?

A. No. I don't want them to cut out our prices and preferred not to sell them goods if they were going to cut our prices.

Q. Did you go to Chapital and tell him not to sell for less?

A. No, Sir.

Q. What did you go there for?

A. Routine call to sell whatever merchandise he wanted to buy.

Q. Then you went there to sell him goods?

A. Certainly.

Q. And it is a coincidence that he happened to run an ad a few days before?

A. Yes, Sir.

Q. And the same thing is true as to B & W on Canal and Broad Streets?

A. Yes, Sir.

Q. And the same thing holds true with respect to Papania?

A. It isn't quite so with Mr. Papania, because we had a lawyer file suit against Papania for selling it for $3.09.

Q. What did you do with that suit?

A. He came to our office Monday morning and asked us not to take him to Court.

Q. You withdrew that suit voluntarily?

A. I think he asked us to withdraw it.

Q. Did you make any charge against him for violating the Fair Trade Act?

A. I know we didn't go to Court with him. I want to state the thing right. I think Mr. Goldring can better advise you on that.

Q. You brought it up. I just want the facts. You didn't bring suit against him for violating the Fair Trade Act?

A. That's right.

Q. You didn't bring suit against him for violating Act No. 360?

A. That's correct.

Q. Why didn't you bring suit for violating the Fair Trade Law?

A. I don't think Magnolia Liquor has a contract with the retailer, or did we have a contract with the retailers to enforce the Fair Trade Act?

Q. Have you been back to Schwegmann since that time?

A. No, I haven't.

Q. Have you been back to Schwegmann Brothers in the last eight days to see what he is selling your Seagram products for?

A. No, Sir.

Q. Had you ever been to Schwegamann before that?

A. Yes, Sir.

Q. You had called on him before?

A. Yes.

Q. Schwegmann didn't run any advertisement in the local Papers on Seagram products for less than the prices that Seagram maintains, that you know of?

A. Not that I know of, not recently.

Q. Schwegmann was not one of the advertisers since Act 360 went into effect?

A. I don't believe so.

Q. You went on your routine sales trip to all the people selling Seagram products at a cut price?

A. No, I don't think Walgreen's advertised it. I don't think that Solari's had run an ad on our merchandise at that time on Seagram.

Mr. Stone:
That is all.

Mr. Suthon:
That is all.

MANFRED WILLMER, Witness being duly sworn on behalf of plaintiff, was examined and testified as follows:

Direct Examination.

By Mr. Suthon:

Q. Please state your name?

A. Manfred Willmer.

Q. Mr. Willmer, do you know Mr. Anthony Papania of Pap's Liquor Store?

A. Yes, Sir.

Q. There has been some testimony here about Magnolia Liquor Company filing suit against Mr. Papania and that suit discontinued. Were you present at the time anything was done about the discontinuance of that suit?

A. Yes, Sir.

Q. Was Mr. Papania then present?

A. Yes, Sir.

Q. I show you two documents which I will mark Willmer-1 and Willmer-2, and which purport to bear the signature of Anthony Papania and ask you if those documents were signed by Anthony Papania in your presence?

A. Yes, Sir, they were.

Offer: Mr. Suthon:

I now offer in evidence the two documents identified by the witness as having been signed by Mr. Anthony Papania in his presence. The one marked Willmer-1 is headed "Statement of Mr. Stephen Goldring, President of Magnolia Liquor Company, Inc., and reads as follows: (Counsel reading statement to the Court.) The witness testified it was signed by Mr. Papania in his presence.

The other document is dated December 14, 1949. (Counsel reading document to the Court.)

Q. Mr. Willmer, I note the document marked Willmer-2 is dated November 14, 1949. The document which I marked Willmer-1 is undated. Were those two documents signed at the same time or different times?

A. They were signed at the same time.

Q. What date were they signed on?

A. I remember it was Monday. I would have to consult a calendar to be specific as to the date. Yes, that was Monday, November 14, 1949.

Offer: Mr. Suthon:

I also desire to offer in this connection certified copy of record in suit No. 293,699 for the Civil District Court for the Parish of Orleans, State of Louisiana, being a suit by Magnolia Liquor Company, Inc. and Vincent J. Randazzo versus A. Papania d/b/a Paps Food Store or Paps Liquor Store, marking it for identification Willmer-3.

The Court:

Let it be admitted.

Mr. Stone:

No objection.

Cross Examination.

By Mr. Stone:

Q. Mr. Willmer, who prepared this statement which carries the heading: "Statement of Mr. Stephen Goldring, President of Magnolia Liquor Company, Inc."?

A. I think it was prepared by our attorney.

Q. Your attorney prepared this for Mr. Papania's signature?

A. Yes, he prepared the statement.

Q. Whose statement is this, Mr. Goldring or Mr. Papania's?

A. It is the statement of Mr. Goldring.

Q. Did Mr. Goldring sign this statement?

A. His signature is not on there.

Q. Is it a statement of Mr. Papania or Mr. Goldring?

A. It is a statement of Mr. Goldring.

Q. Mr. Goldring didn't prepare it. Your attorney prepared it?

A. Yes.

Q. For whom was the statement furnished?

A. For the Press.

Q. Did it appear as a statement of the attorney or a statement of Mr. Papania?

A. I don't know.

Q. What did you have to do with preparing this statement?

A. I had nothing to do with it.

Q. How did you know it was a statement by Mr. Papania.

A. I didn't identify it as a statement by Mr. Papania.

Q. Mr. Papania told you the statement was prepared by Mr. Goldring?

A. Yes, Sir.

Q. You took it to Mr. Papania for signature?

A. Yes, Sir.

Q. That is the reason you testified to it?

A. Yes, Sir.

Q. You stated Magnolia Liquor Company would enforce fair trade agreements. Does that mean it would enforce fair trade agreements with respect to Seagram products?

A. I can't answer that.

Q. Then you don't know what the meaning of this statement is?

A. I wouldn't say that either.

Q. All you can identify is that Mr. Papania signed it?

A. Yes, Sir.

Q. As salesman of Magnolia, I ask you does Magnolia fair trade the prices on Seagram products?

A. We have urged everyone to do so.

Q. Does Magnolia enforce it?

A. I don't think we have authority to do it.

Q. When Mr. Goldring makes the statement that Magnolia Liquor Company is going to enforce a fair trade agreement, Mr. Goldring makes the statement without authority?

A. I don't know.

Q. Mr. Goldring hasn't authority to enforce a fair trade agreement?

A. I can't answer that yes, or no, Sir.

Mr. Stone:

No further questions.

Mr. Suthon:

That is all, Mr. Willmer.

STEPHEN GOLDRING, Witness, being duly sworn on behalf of plaintiff, was examined and testified as follows:

Direct Examination.

By Mr. Suthon:

Q. Please state your name?

A. Stephen Goldring.

Q. Mr. Goldring, what company are you connected with and what is your connection?

A. In New Orleans with the Magnolia Liquor Company as president. I am president of the Sazarac Company the same.

Q. Are you also a stockholder in the Magnolia Liquor Co.?

A. Yes, Sir.

Q. How long have you been connected with the Magnolia Liquor Company here?

A. Since its organization.

Q. What business is the Magnolia Liquor Company, Inc. in?

A. Wholesale Liquor business.

Q. What products of Seagram do you sell, do you recall?

A. Seagram V O; Seagram 7 Crown, Ancient Bottle Gin.

Q. How long has Magnolia been handling Seagram products in this locality?

A. Since 1944.

Q. There has been testimony here about a suit of the Magnolia Liquor Company, Inc. in the Civil District Court of the Parish of Orleans, No. 293,699, against A. Papania d/b/a Paps Food Store and or Paps Liquor Store, in which Vincent J. Randazzo sued with Magnolia Liquor Co., Inc. Did you have any connection with filing that suit? I show you copy of the record in that suit marked Willmer-3?

A. Yes, we instituted that suit.

Q. Why did you file the suit?

A. Because the price of Seagram 7 Crown advertised in the Papers being sold at, was called to my attention and the price was below even Mr. Papania's cost price.

Q. After the filing of that suit did you have anything to do in connection with the settlement of that suit, and if so, what?

A. Yes, Sir. When that suit was filed Mr. Papania came into my office and he told me he did not know he was violating any law and he didn't want to violate any law and he would do anything that was right in order to stop the case. My advice to him was we were only interested in getting the prices raised, how could he sell below cost price? His argument to me was that Mr. Schwegmann was one of his competitors and he knows that he cuts prices,

and he knew of customers that went to Schwegmann's store, and that was the reason he did it, and it cost him $1,000.00 one weekend. I consulted my attorney, and Mr. Papania said he would not cut the prices any more and he would sell it at the $4.24 price. Then I discontinued the suit.

Q. I show you now two documents which purport to bear the signature of Anthony Papania already offered in this case and offered as Willmer-1 and Willmer-2, and ask you if those documents had anything to do in connection with the dismissal of this suit?

A. These are the documents which I gave to Mr. Willmer to have signed. One document is the statement of Mr. Goldring signed by Mr. Papania, and he agreed to sign it and we gave it to the Press to show that the case was discontinued, because Mr. Papania agreed to raise his prices. This other document here was signed by Mr. Papania also.

Q. Did you see Mr. Papania sign it?

A. I didn't see him sign it. I believe it was signed at his store. They were not signed in my presence.

Q. Who brought them to you after they had what appears to be the signature of Mr. Papania on them?

A. I gave them to Mr. Willmer, I don't recall the exact incident, but he either gave them to me or to Mr. Steeg. I don't recall exactly who he gave them to.

Q. After you got these documents what did you do about the suit?

A. Nothing else has been done since then.

Q. Didn't you authorize Mr. Seeg to dismiss the suit after you got these documents?

A. Yes, I authorized Mr. Steeg to dismiss the suit, but I don't know what action has been taken. That was in his hands.

Mr. Suthon:

That is all.

Cross Examination.

By Mr. Stone:

Q. That statement is labelled: "Statement of Mr. Stephen Goldring, President of Magnolia Liquor Company, Inc." Did you personally prepare that statement, Mr. Goldring?

A. I discussed it with my attorney, Mr. Steeg, who typed it in his office at my instructions.

Q. Did you prepare the contents of that statement personally for Mr. Steeg's stenographer to transcribe?

A. I didn't dictate it to his stenographer, but I read the statement before it went to Mr. Papania.

Q. You are familiar with the statement, of course?

A. I didn't read the full statement right now, but I did read it at the time.

Q. Look at this statement and tell me if it is correct so far as you and the Magnolia Liquor Company are concerned?

A. In the first paragraph it says: "Mr. Anthony Papania has contacted us concerning our law suit against him for violation of the Unfair Sales Practice Act." This first statement is exactly true and is the way I told it to Mr. Steeg.

Q. Read the whole document and analyze it?

A. You want me to read it out loud?

Q. No, read it to yourself.

A. (Witness does as requested). What is your question now?

Q. Does that document reflect the true statement with respect to you and the Magnolia Liquor Company and your position on the matters that are referred to in that statement?

A. It reflects my personal opinion.

Q. Your personal views and also views of the Magnolia Liquor Company?

A. When you talk about Magnolia, I have to have discussions on any company policy with my partners.

Q. Is it a partnership or corporation?

A. Corporation.

Q. Aren't you president of that corporation?

A. I am.

Q. Did you discuss the signing of this statement with your other officers or partners?

A. No.

Q. They didn't know anything about this?

A. I don't know whether they knew anything about it. I didn't discuss that particular statement with them.

Q. You handled it yourself?

A. Yes, Sir.

Q. Does Magnolia Liquor Company enforce fair trade prices on Segram products in this area?

A. No, Sir.

Q. Magnolia Liquor Company has nothing to do with the fixing of fair trade prices on Seagram products in this area, does it?

A. No, Sir.

Q. The fixing of fair trade prices and the enforcement of the fair trade prices together with the policing of accounts in this area are all the function of Seagram Distillers Corporation?

A. I don't know who is the policeman on it, or who does the policing—

Q. I asked you whether or not the function of fixing the fair trade prices, the enforcing of fair trade prices and the policing of fair trade prices is on Seagram or Magnolia in this area?

A. I take it, it is on Seagram.

Q. It is not on Magnolia then?

A. Not to my knowledge.

Q. Magnolia doesn't do any policing in this area to see whether fair trade prices are being violated?

A. If I saw prices being cut I would notify Seagram.

Q. You would not go out to the various accounts to see whether or not they were violating the fair trade price?

A. No, Sir.

Q. Who in your corporation would do that to find out whether they were violating fair trade prices, if anybody?

A. Only the salesmen call on the account regularly.

Q. You and your vice-president, Mr. Woldenberg, would not go out to see if they were violating the fair trade prices in the trade?

A. Not as a practice.

Q. The hardly ever do it?

A. No, Sir.

Q. Your statement here: "it is our intention to enforce this," that statement is not true. You are not making a true statement when you say you are going to enforce fair trade?

A. Not on fair trade, but on unfair trade.

Q. Do you say unfair or fair here?

A. I said fair.

Q. What did you mean by making that statement?

A. Exactly what it says.

Q. What does it say?

A. "The suit was brought by Magnolia Liquor Co., Inc. was brought to enforce the provisions of the law, and it is our intention to enforce this, or any other Louisiana Statute, or any fair trade agreement, relating to the products which we distribute. We recognize that the Alcohol Beverage Control—"

Q. Let me stop you there. You do take upon yourself the enforcement of fair trade agreements on Seagram products

A. I do as far as this. It says fair trade agreement, I should have said unfair trade agreement.

Q. When you say fair trade agreement you mean unfair trade agreement?

A. We couldn't take an injunction under the Fair Trade Act.

Q. If you had inquired you would have found out that you could. You did not take action on the Fair Trade Act at that time on Papania?

A. No, Sir.

Q. But you declared to the public that you had the power to fair trade and enforce that Act?

A. In this statement it states that.

Q. And you state you are familiar with everything in that statement?

A. I said I told my attorney who prepared it.

Q. Why didn't you proceed to your attorney and find out if you were correct?

A. I don't think there was a fair trade agreement in effect. The present fair trade agreement was sent out, to my knowledge—this ad appeared a day or two after the law was declared unconstitutional.

Q. The ad appeared on November 10 in the Item and on November 11 in the Picayune. That is my information, if that will help you any. So you proceeded against him immediately after that on the unfair sales act?

A. That is correct.

Q. And after November 11 there was no Fair Trade Act?

A. I can't say.

Q. I ask you whether or not as President of Magnolia, the corporation that distributes exclusively in this area, that if there was any unfair trade agreement in Louisiana on Seagram 7 Crown whiskey? That question can be answered yes, or no.

A. I can't answer the question yes or no without explaining—

Q. Answer yes or no and then explain it?

A. Yes, I thought there was a fair trade agreement.

Q. Now explain it?

A. I didn't know if the act was good.

Q. What, act?

A. The voluntary fair trade agreement act.

Q. You didn't know whether it was good or not?

A. No, I am not an attorney.

Q. By good, you mean economically sound?

A. No. First of all, I knew we could take no action.

Q. What do you mean by that?

A. I understand there had to be a six percent mark up on Seagram products, and Mr. Papania was selling merchandise below his cost.

Q. You felt the enforcement of the fair trade act was entirely up to Seagram Distillers?

A. That is correct.

Q. And not up to you?

A. That is correct.

Q. So that when you made that statement to the Press that you had Mr. Papania sign that statement, you were not making a true statement with respect to fair trade?

A. According to the legal terminology, no.

Q. You were not making a correct statement?

A. According to the legal terminology, no.

Q. Now Magnolia—and I think I am right when I say Mr. Woodenberg has testified to this—Magnolia does not fix the prices on Seagram products that will be the subject of fair trade contracts, but that particular function is in Seagram Distributors Corporation, or some of their superiors?

A. That is correct.

* * * * * * * *

DECREE GRANTING PRELIMINARY INJUNCTION.

Filed: December 20th, 1949.

United States District Court Eastern District of Louisiana, New Orleans Division.

Seagram Distillers Corporation,
versus No. 2608 Civil Action.
Schwegmann Brothers et al.

This cause having been hear submitted and taken under advisement on the motion of plaintiff for a preliminary injunction, and on the defenses to demand for a preliminary injunction presented by defendants in their motion to dismiss and in their answer, and the Court having taken time to consider, and the law and the evidence being in favor of plaintiff and against defendants:

It Is Ordered, Adjudged And Decreed, That the motion to dismiss of defendants be denied.

It Is Further Ordered, Adjudged and Decreed, That the motion for a preliminary injunction herein be and the same is hereby granted and accordingly, that upon the filing of a bond in this cause in the sum of $1000.00 the said defendants, the partnership of Schwegmann Brothers, and the individual partners therein, John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, and each of them, their officers, agents, servants and employees, and all persons acting in aid of or in conjunction with them, or any of them, be and they are hereby enjoined and restrained, pending the final hearing of sooner determination of this cause, from in any manner or by any means, direct or indirect, advertising for sale or offering for sale or selling any of the products or commodities of plaintiff,

Seagram-Distillers Corporation, which bear, or the labels or containers of which bear, the trade-marks or name of plaintiff, which defendants now have or which they may hereafter acquire, at prices less than the minimum prices shown for each of said products in the minimum price schedule of plaintiff dated November 14, 1949, and annexed to the complaint herein as Exhibit "C", which products and the respective minimum prices scheduled therefor are as follows:

	Minimum Consumer Retail Price				
"Brand	Half-Gallon	Quart	Fifth	Pint	Half-Pint
"Seagram's Seven Crown Blended Whiskey	$10.42	$5.26	$4.24	$2.68	$1.37
"Seagram's V. O. Canadian Whiskey—A Blend			5.87	3.70	1.88
"Ancient Bottle Distilled Dry Gin			3.93	2.48	1.27

"The prices established above for each brand and size apply to all alcoholic beverages in the particular size which are sold under that brand name, regardless of differences, if any, in class, type, formula, proof, etc.

"The said prices include all Federal, State and City taxes except State and City sales taxes. These prices are applicable to all sales to consumers in the City of New Orleans and are not applicable outside the City of New Orleans." as amended by the minimum price schedule issued by plaintiff under date of December 1, 1949, effective December 6, 1949, so as to incorporate in said minimum price schedule the following:

"A discount of not to exceed 10% is authorized on full case sales."

or at prices less than those which may be shown in any future minimum price schedule hereafter issued by plaintiff under and pursuant to its contracts with retailers, entered into in conformity with the Louisiana Fair Trade Act, and from making any regates, refunds, discounts or concessions of any kind or character to purchasers in connection with the purchase of, or which will aid in decreasing the selling price of said products or commodities below said minimum selling prices, save and except only in those cases wherein defendants are (a) closing out their stock for the purpose of discontinuing delivering any of such commodities, or (b) when the goods are damaged or deteriorated in quality and notice is given to the public thereof, or (c) when the sale is by an officer acting under the orders of any Court.

Thus Done And Entered at New Orleans, Louisiana on the 20th day of December, 1949.

(S.) J. SKELLY WRIGHT,
United States District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON MOTION OF PLAINTIFF FOR PRELIMINARY INJUNCTION.

Filed: January 10, 1950.

(number & title omitted.)

The Court hereby makes the following Finidngs of Fact upon the verified complaint, the exhibits attached thereto, the affidavits offered and filed in support of the motion

for a preliminary injunction, and the evidence offered by both parties on the trial of the motion.

Findings of Fact.

1. Plaintiff is a Delaware Corporation and for jurisdictional purposes a citizen of the State of Delaware. Defendants are a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, all residents of New Orleans, Louisiana, and all defendants are for jurisdictional purposes citizens of the State of Louisiana. The matter in controversy herein exceeds exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars.

2. Plaintiff sells and distributes to wholesalers, and, for some years past, has sold and distributed to wholesalers on a large scale certain commodities (whiskey and gin) which bear the trade-marks owned by its parent company, Joseph E. Seagram and Sons, Inc. Plaintiff's parent corporation, the owner of these trade-marks, has specifically authorized plaintiff to esablish and to enforce in Louisiana minimum retail prices for its trade-marked beverages. These commodities bearing the trade-marks as herein set forth, are and have been sold on a large scale by retailers to consumers in the City of New Orleans and elsewhere in the State of Louisiana and throughout the United States. The good will attached to these commodities bearing the trade-marks owned by plaintiff's parent corporation, and the demand therefor among the distributing trade and the consuming public, are and have been of substantial value to plaintiff's parent corporation throughout the United States, in the City of New Orleans, and elsewhere in the State of Louisiana. Plaintiff's rights, as the sole distributors for these products in the State of

Louisiana and in the City of New Orleans, are well worth substantially in excess of Three Thousand ($3,000.00) Dollars. The commodities bearing the trade-marks of plaintiff's parent corporation are and have been in free, fair, and open competition with other commodities of the same general class, produced by others throughout the United States, in the City of New Orleans, and elsewhere in the State of Louisiana.

3. Joseph E. Seagram and Sons, Inc., is an Indiana corporation which manufactures "Seagram's 7 Crown", "Seagram 5 Crown", blended whiskies, "Seagram Ancient Bottle", distilled dry gin, and "King Arthur", distilled London dry gin. Joseph E. Seagram and Sons, Ltd., an affiliate of Joseph E. Seagram and Sons, Inc., is a Canadian corporation which manufactures "Seagram V. O.", "Seagram '83", blended whiskies, and "Seagram Pedigree Rye or Bourbon", straight whiskey. None of these products is manufactured in Louisiana. The trade-marks, "Seagram" and "Kink Arthur", are owned by Joseph E. Seagram and Sons, Inc., and registered in the United States Patent Office in the name of that corporation. Plaintiff, Seagram Distillers Corporation, is a Delaware corporation wholly owned by Joseph E. Seagram and Sons, Inc. It is the exclusive distributor in the State of Louisiana and other states for products bearing the Seagram trade-marks.

4. Retail prices on the Seagram products are established by means of fair trade contracts, substantially identical through the United States, executed, pursuant to local law, between local retail liquor dealiers and plaintiff. Pursuant to authority delegated by its parent corporation, the trade-mark owner, plaintiff fixes retail price schedules for its parent's trade-marked products. Excluding variations depending upon freight rates and local taxes, this retail

price is uniform in those states which permit retail price maintenance on alcoholic beverages. In states in which retail prices established by fair trade contract are binding upon non-signing retail dealers, notice of the retail fair trade contract price then is given to local retail dealers. In this case, prices schedules and notices were prepared in New York and mailed to defendant and other Louisiana retailers from Coral Gables, Florida. Authority to enforce retailer maintenance of the retail prices is vested in plaintiff.

5. Plaintiff, a distributor of Seagram products in Louisiana, warehouse no goods in this state. Orders are received in Louisiana but processed out of Louisiana. Plaintiff does not do business with wholesalers generally, but operates through "exclusive" wholesalers, who are appointed to handle its products. On occasion, plaintiff's agents assist these local wholesalers by accompanying their sales representatives in soliciting sales of the merchandise distributed by plaintiff. Neither the retailer nor the exclusive wholesaler fixes the retail price.

6. After the adoption of Act 13 of the Louisiana Legislature of 1936 and the Act of Congress of Aug. 17, 1937, c 690, Title VIII, 50 Stat. 693, 15 USCA 1, plaintiff on various dates in March to June, 1948, entered into identical written contracts with a number of retailers in the State of Louisiana, including retailers in the City of New Orleans. Under the contract terms, these contracts were renewed by the inaction of the parties one year from the dates of their execution. On November 10 and November 11, 1949, plaintiff entered into identical contracts with six retailers in the City of New Orleans. Plaintiff did not enter into any such contracts with retailers in the City of New Orleans or in the State of Louisiana on November 12,

1949, or any date thereafter. These contracts were made with respect to the commodities sold and distributed by plaintiff and bearing the trade-marks owned by its parent company. Copies of the form upon which all of these written contracts were entered are attached to plaintiff's complaint as "Exhibit A".

7. During the interval from June, 1948, until November 10, 1949, plaintiff made no effort to enforce the contracts entered into in March to June, 1948, and renewed in March to June, 1949. On or about July 28, 1948, the Louisiana Alcoholic Beverage Control Act (La. Act 360 of 1948) became effective. Section 24 of this statute fixed minimum prices for alcoholic beverages at all distributive levels, including the retail level. The minimum prices established for plaintiff's products were substantially the same as those established by previously executed fair trade contracts. Efforts to enforce these prices were made by the Louisiana Board of Alcoholic Beverage Control and Act 360 of 1948 from July 28, 1949, until November 7, 1949. On this latter date, the Louisiana Supreme Court held invalid the price fixing provisions of the Alcoholic Beverage Control Act. The contracts entered into on November 10 and 11, 1949, are still in force and effect. It is unnecessary to determine whether the 1948 contracts and the renewals thereof are in full force and effect.

8. Following telegraphic notice on or about November 10, 1949, to all retail liquor dealers in the State of Louisiana, in the form of "Exhibit B" attached to the complaint, plaintiff, on or about November 14, 1949, established at its head office in New York City a new schedule of minimum prices under its contracts in the form of "Exhibit A" attached to the complaint, which new schedule of minimum prices was in the form of "Exhibit C" attached to the complaint and was effective November 14, 1949. This new

schedule of minimum prices was promptly notified to the trade generally and to the other parties to the contracts with plaintiff in the form of "Exhibit A" attached to the complaint through the mailing of copies thereof by plaintiff to such parties. This schedule of minimum prices in the form of "Exhibit C" attached to the complaint is the schedule of minimum prices in force between plaintiff and other contracting parties as of the dates material to this action, under the contracts in the form of "Exhibit A" attached to the complaint. These schedules of minimum prices were modified effective December 6, 1949, by an amendment allowing a discount not to exceed 10% on full case sales. As thus amended, these schedules constitute the schedule of minimum prices currently in force between plaintiff and other contracting parties under the contracts in the form of "Exhibit A" annexed to the complaint.

9. Defendants have never entered into any contract with plaintiff in the form of "Exhibit A" attached to the complaint, nor have they entered into any similar contract with plaintiff.

10. Defendants, with full knowledge of the contracts between plaintiff and other retailers in the City of New Orleans and elsewhere in the State of Louisiana in the form of "Exhibit A" attached to the complaint, and with full knowledge of the minimum price schedules set forth in "Exhibit C" attached to the complaint, on various occasions have offered for sale and sold at retail in their place of business in the City of New Orleans, State of Louisiana, commodities bearing the trade-marks owned by plaintiff's parent corporation at various prices below the minimum prices specified in said minimum price schedules in force at the time of such sales by defendants. Defendants will continue such selling activities unless enjoined and restrained therefrom.

11. Plaintiff has filed in this Court several other suits of a similiar nature against other retailers, and has also made, or caused to be made, extra-judicial efforts to persuade other retailers, to desist from offering, advertising, and selling the commodities bearing its trade-marks and name at retail at prices less than those set forth in "Exhibit C". Plaintiff has not discriminated against defendants in the enforcement of the rights of plaintiff asserted by this suit, and has used due diligence in efforts to enforce those rights generally.

Conclusions of Law.

The Court hereby enters the following Conclusions of Law:

1. The selling activities of defendants described in Finding of Fact No. 10 constitute unfair competition, violative of the legal rights of plaintiff, and are actionable by plaintiff; La. Act 13 of 1936; 15 USCA 1, Pepsodent Co. v. Krauss Company, Ltd. International Cellucotton Products Company v. Krauss Company, Ltd., 200 La. 959, 9 So. 2d 303; Old Dearbon Distributing Co. v. Seagrams-Distillers Corp. 299 U. S. 183, 57 S. Ct. 139, 811. Ed. 108; 106 A. L. R. 1476; Mennen Co. and Bristol-Meyers Co. v. Krauss Co. Ltd., 134 F. 2d 348 (CCA 5, La.); Pepsodent Co. v. Krauss Co., Ltd., 56 F. Supp. 922 (D. C. La.)

2. Defendants have attempted to show that plaintiff's actions in fixing retail prices constitute a restraint of trade between the states. No finding on this feature of the case is required, however, in view of the Miller-Tydings Amendment to the Sherman Anti-Trust Act. Act of Congress of Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 USCA 1; Pepsodent Co. v. Krauss Co., Ltd., 56 F. Supp. 922 (D. C. La.)

3. Plaintiff has no adequate remedy at Law and is therefore entitled to injunctive relief.

4. A preliminary injunction should be issued herein as prayed for by plaintiff.

(S.) J. SKELLY WRIGHT,
United States District Judge.

New Orleans, Louisiana, January 10th, 1950.

NOTICE OF APPEAL TO COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Filed: January 17, 1950.

United States District Court Eastern District of Louisiana, New Orleans Division.

Seagram Distillers Corporation,
versus No. 2608 Civil Action.
Schwegmann Brothers, et al.

To The Honorable, The United States District Court for the Eastern District of Louisiana, New Orleans Division:

Notice is hereby given that Schwegmann Brothers, John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, defendants above named, hereby appeal to the Court of Appeals for the Fifth Circuit from the judgment

and decree granting a preliminary injunction entered in this action on December 21, 1949.

WISDOM AND STONE,
JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendant.

312 Whitney Building,
New Orleans, Louisiana.
By JOHN MINOR WISDOM.

STIPULATION OF RECORD ON APPEAL.

Filed. 3/16/50.

(number & title omitted.)

It is hereby stipulated by and between Seagram Distillers Corporation, plaintiff and appellee, and Schwegmann Brothers, John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, defendants and appellants in the above entitled cause, by and through their respective attorneys, that the following parts of the record, proceedings, and evidence in this cause are hereby designated to be included and shall be includ d in and constitute the record on appeal in this cause:

(1) Bill of Complaint;

(2) Fair trade contract form (Exhibit A), annexed to complaint;

(3) Affidavit of Sidney E. Rudman, annexed to complaint;

(4) Motion to dismiss;

(5) Answer to complaint;

(6) Stipulation;

(7) Findings of fact and conclusions of law;

(8) Decree granting a preliminary injunction;

(9) Notice of Appeal;

(10) Order extending time to file record in the Court of Appeals;

(11) This stipulation;

(12) Appellants' statement of the points upon which they intend to rely;

(13) The following portions of the official Court reporter's transcript of the evidence in these proceedings:

Page	Lines
1	1-18
2	Entire page
3	1-13; 18-25
4	1-19
5	2-5
6	Entire page
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JOHN MINOR WISDOM,
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Attorney for Defendants-Appellants.

312 Whitney Building,
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STATEMENT OF POINTS.

Filed: March 16th, 1950.

(number & title omitted.)

Defendants-Appellants intend to rely on the following points in their appeal to the Court of Appeals for the Fifth Circuit:

I.

The Court erred in holding that the Miller-Tydings Amendment to the Sherman Anti-Trust Act permits price fixing in an interstate transaction as to one not a party to a fair trade contract.

II.

The Court erred in not dismissing plaintiff's complaint for failure to state a claim upon which relief could be granted. The Court should have dismissed the complaint on the ground that the fair trade contracts which constitute the basis of plaintiff's cause of action are null and void under the law of Louisiana in that the contracts lack mutuality, because plaintiff incurred no obligation thereunder; or, in the alternative, if an obligation on the part of plaintiff inferentially exists, this obligation is subject to purely potestative conditions.

JOHN MINOR WISDOM,
(John Minor Wisdom,)
Attorney for Defendants-Appellants.

312 Whitney Building.

CLERK'S CERTIFICATE.

I, A. DALLAM O'BRIEN, JR., Clerk of the District Court of the United States for the Eastern District of Louisiana do hereby certify that the foregoing 101 pages contain and form a full, true and complete transcript of the record, in the case entitled "Seagram versus Schwegmann Brothers, Et Al." No. 2608 of the Civil Action Docket of this Court as made up in accordance with the Designation of Contents copied herein.

Witness my hand and seal of said Court at the City of New Orleans, La., this 23rd day of March, A. D. 1950.

A. DALLAM O'BRIEN, JR.,
Clerk.

By ANDREW J. BACON,
Deputy Clerk.

(Seal)

[fol. 93] JOINT MOTION AND ORDER TO CONSOLIDATE CAUSE FOR BRIEFING AND ARGUMENT—Filed March 30, 1950

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 13-162

SCHWEGMANN BROTHERS, ET AL., Appellants,

vs.

CALVERT DISTILLERS CORPORATION, Appellee

JOINT MOTION TO FIX CAUSE FOR ARGUMENT

To the Honorable the United States Court of Appeals for the Fifth Circuit:

The appellants and the appellee, appearing herein by and through their respective attorneys, move the Court to assign this cause for oral argument on some date prior to the date of adjournment of the Court for the present term, and to consolidate this cause, for purposes of oral argument, with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants, vs. Calvert Distillers Corporation, Appellee, No. 13-162 of the docket of this Court, for the following reasons:

(1) This cause is a preference cause, involving a question of appellee's right to injunctive relief against appellants; the preliminary injunction granted by the District Court herein is now in full force and effect and binding upon appellants;

(2) This cause involves substantially the same questions of law as are involved in the cause now pending before this Court, entitled Schwegmann Brothers, et al., vs. Calvert Distillers Corporation, No. 13-162, in which cause the parties have filed contemporaneously with this motion a similar motion, praying that both causes may be consolidated for purposes of oral argument before this Court at the same time;

[fol. 94] (3) All parties desire that this matter be disposed of as expeditiously as possible and, to the end of dividing the time for preparing briefs equitably between them and also having both briefs served at least five days

before the argument date, they hereby agree, subject to the approval of the Court, that appellants' brief shall be delivered to the appellee by a date halfway between the date of notice of completion of the printing of the record and the date five days before the argument date, and appellee's brief shall be delivered to appellants five days before the argument date.

(4) The successor to the commercial partnership, one of the appellants herein, is now a party defendant in three causes presently pending in the District Court of the United States for the Eastern District of Louisiana, in which causes questions of law substantially similar to those involved herein must be argued and decided; decision in the instant cause may be of controlling authority in these causes now pending in the District Court;

Wherefore, appellants and appellee pray that this cause may be assigned and fixed for oral argument at New Orleans, Louisiana for some date before the adjournment of this Court for the present term; that their agreement relative to division of the time available for preparing briefs be approved, and that this cause be consolidated for purpose of oral argument with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants, vs. Calvert Distillers Corporation, Appellee, No. 13-162 of the docket of this Court.

/s/ Wisdom & Stone, Paul O. H. Pigman, Wisdom and Stone, 312 Whitney Building, New Orleans, Louisiana, /s/ Monroe & Lemann, Walter J. Suthon, Jr., Monroe and Lemann, 1424 Whitney Building, New Orleans, Louisiana.

[fol. 95] Order

Considering the foregoing motion,

Let this cause be and it is hereby assigned and fixed for oral argument before this Court at New Orleans, Louisiana on the 7th day of June, 1950, appellants' brief to be delivered to appellee by the date halfway between the date of notice of completion of the printing of the record and the date five days before the argument and appellee's brief to be delivered to appellants five days before the argument date.

Let this cause be consolidated for purposes of oral argument with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants, ve. Calvert Distillers Corporation, Appellee, No. 13-162 of the docket of this Court.

New Orleans, Louisiana.
March 30, 1950.

/s/ Wayne G. Borah, Judge.

[fol. 96] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

No. 13163

ARGUMENT AND SUBMISSION

Extract from the Minutes of June 7, 1950.

SCHWEGMANN BROTHERS, ET AL.,

versus

SEAGRAM DISTILLERS CORPORATION

On this day this cause was called, and after argument by John Minor Wisdom, Esq., for Appellants and Walter J. Suthon, Jr., Esq., for Appellee, was submitted to the Court.

[fol. 97] OPINION OF THE COURT FILED—July 27, 1950

IN THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

No. 13,162

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

CALVERT DISTILLERS CORPORATION, Appellee

and

No. 13,163

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

SEAGRAM DISTILLERS CORPORATION, Appellee

Appeals from the United States District Court for the Eastern District of Louisiana

(July 27, 1950)

Before HUTCHESON, Chief Judge, and McCORD and RUSSELL, Circuit Judges.

HUTCHESON, Chief Judge: Based on diversity and amount, these two suits, brought under Sec. 2 of Act No. 13 of 1936, La. R. S. 51:391-396, the Louisiana Fair Trade [fol. 98] Act,[1] were for injunctions, preliminary and permanent.

Defendants appeared by answers and motions to dismiss, and, the applications for preliminary injunctions coming on for hearing, there were findings of fact and conclusions

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[1] "Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

of law in plaintiffs' favor, and a decree in each suit granting the preliminary injunction as prayed.

The defendant in each suit appealing, the two appeals were set and heard together, and now stand for disposition on appellants' two contentions.

One of these is that the so-called resale price maintenance contracts between plaintiffs and other retailers than defendants, on which enforcement of the fair trade act against the non-signing defendants is based, are null and void under the laws of Louisiana for want of mutuality or because of potestativity.

The second is that the scope of the resale price maintenance permitted (when valid under state law) by the Miller-Tydings Amendment [2] to the Sherman Act,[3] relied on by plaintiffs to save their price fixing activities from the Sherman Act does not extend to resale price maintenance against defendants, non-contracting retailers.

Appellees vigorously dispute the correctness of both of these contentions, and, by way of preliminary counterattack, contrary to the position taken in their pleadings and [fol. 99] on the trial, assert that the sales sought to be enjoined were wholly intrastate sales, therefore beyond the reach of the Sherman Act.

They admit: that each plaintiff operates on a nation wide scope and functions in interstate commerce; that each uses the mails interstate and functions in some respects from headquarters in New York in formulating the minimum price schedules under the fair trade contracts with various retailers in the several states having such statutes and in giving notice of these contracts and price schedules to all retailers in the state; and that the liquors which each plaintiff sells to Louisiana wholesalers are shipped in interstate commerce from points outside Louisiana to the purchaser in Louisiana following such sales.

They insist, however: that the reselling activities regulated by the injunctions herein represent the second intra-

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[2] Act of Aug. 17, 1937. See Ch. 690, Title VIII, 50 Stat. 693, 15 U.S.C., Sec. 1.

[3] Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U.S.C. Secs. 1-7.

state transaction in the sequence of events following the movement of these liquors into Louisiana in interstate commerce pursuant to sales made by the distributors to Louisiana wholesalers; that these wholesalers then sell intrastate to retailers; and that these in turn sell intrastate to their customers.

Appellants, on their part, point to the facts: that plaintiffs have expressly invoked the Miller-Tydings Act; that they have expressly alleged a plan of general interstate operation and activity, in control of price and restraint of trade; that they have tried the case below on the theory that interstate commerce was affected; and that they have, without distinction between interstate and intrastate sales, sought and obtained an injunction whose purpose and effect is to maintain the pattern of restraints on commerce be- [fol. 100] tween the states which the plan was designed to, and does, make effective.

Citing in their support *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373, and *United States* v. *Frankfort Distilleries*, 324 U.S., 293, they urge upon us that appellees in thus focusing here on the particular sales made by appellants, have not only abandoned the theory on which the suit was brought and tried but have completely missed the point of decision in the *Miles* case, *supra*, at p. 400:

> "That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with 'most of the jobbers and wholesale druggists and a majority of the retail druggists of the country' and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several States, is also clear. *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211; *Bement* v. *Natl. Harrow Co.*, 186 U.S. p. 92; *Montague & Co.* v. *Lowry*, 193 U.S. 38; *Swift & Co.* v. *U. S.*, 196 U.S. 375."

We agree with appellants that though the sales made by appellants were made intrastate, the transactions, the subject of this suit, so affect interstate commerce and the exertion of the power of congress over it as to bring plaintiffs' activities within the reach of the Sherman Act,

unless the Miller-Tydings Amendment to that act excludes them.[4]

This brush fighting, of appellees' making, attended to and out of the way, there remains in the way of our reach-[fol. 101] ing the real battleground of the case, the scope of the Miller-Tydings Amendment, only the equally thin skirmish line which appellants have thrown out in support of their contention that the so-called "Fair Trade Contracts" relied on to support the action are not con-racts within the meaning of the Louisiana Fair Trade Act and the Miller-Tydings Amendment.

In our opinion, this position is as little tenable, is as easily turned and taken, as was the line behind which appellees fought their delaying action. In the first place, if we could agree with appellants' characte zation[5] of these contracts, we could not agree with their conclusion that they would be insufficient to support the statutory action here brought. For it is perfectly plain that whatever the legal and binding effect upon the parties of "these fair trade contracts", it is with "these fair trade contracts"

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[4] *Atlantic Co.* v. *Citizens Ice & Cold Sto-age Co.*, 178 F (2) 453; *Dr. Miles Medical Co.* v. *Park, U. S.* v. *Frankfort, supra.*

[5] "'Contract' is purely a courtesy title when it is applied to a so-called 'fair trade contract'. The word has about the same relation to contracts (as the law knows contracts) as the term 'fair trade' has to fair trade in which retail competition is eliminated. In the advertising slogan 'fair trade contract', 'contract' is a counter word used to convey the impression of a long-accepted, honorable, sacrosanct legal institution—the Mutual Agreement." • • •

"Although these are statutory actions brought against non-signing retailers, the actions are premised upon the existence of a fair trade contract. In support of their action, appellees annexed to each complaint a contract typical of all contracts executed by each appellee. The same form is used by both appellees. The contracts—which undoubtedly were drawn in New York and not by the able Louisiana attorneys for the appellees—are set forth in full in the transcripts."

the statutes in question deal, it is to give effect to "these fair trade contracts" that these statutes were drawn.

But, if we could agree that, in using the word "contract", the statutes meant to, and do, deal only with contracts which are enforceable between the parties, we think the points appellants make against the contracts in question here are strained and without substance, and [fol. 102] that they will not stand up in the light of the modern decisional tendency in Louisiana and elsewhere. This tendency is against too readily lending the aid of courts to defeat contracts on grounds of want of mutuality [6] or the presence of a potestative condition.[7] When, therefore, escape from an obligation is sought on these grounds, it is now settled law that courts will, where reasonably possible to do so, find a contract definite and enforceable.

Coming at last to the main battle ground, whether the Miller-Tydings Amendment is effective to relieve from the the prohibitions of the Sherman Act, the price maintenance contracts relied on in this case, we find both appellants and appellees, instead of coming and sticking to this point, each setting up and completely outfitting a straw man of his own, the legislative history of the act as he claims it to be, and each furiously laying about to knock the other's straw man down.

It is not for one who asserts rights under a state statute to prove as a condition precedent to its enforcement that the legislature had the right to enact it. He may stand upon the presumption of validity until such presumption is overthrown. This is especially so in this case since it is admitted, as indeed it must be, that unless it is prohibited by federal law, the Louisiana Fair Trade law has been

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[6] *Geo. W. Armstrong* v. *So. Pro. Co.*, 5 Cir. (5-26-50), and cases cited; *Port Chester* v. *Miller*, 1 N.Y.S. (2) 802; 281 N.Y. 101; 22 N.E. (2) 253; *Calvert Disti.* v. *Nussbaum*, 2 N.Y.S. (2) 320; *Hutzler Bros.* v. *Remington*, 46 Atl (2) 101; *Shreveport Tractor* v. *Mulhaubt*, 48 So. 144; *Grace* v. *Arnaud's*, 121 So. 359; *Houbigant Sales* v. *Woods*, 196 Atl. 683.

[7] La. Civ. Code, Arts. 2024; 2034; 2035; *Humble* v. *Guillory*, 33 So (2) 182; *Cockburn* v. *O'Meara*, 141 F (2) 779; *Conques* v. *Andrus*, 162 La. 73; 110 So. 93.

already determined to be a valid law of the state of Louisi- [fol. 103] ana [8] binding on consenters and non-consenters alike as a declaration of state fair trade policy which the state is competent to make.

It is admitted, too, that it has been held in *Old Dearborn Distill. Co.* v. *Seagrams Distill. Corp.*, 299 U.S. 183, that state statutes of this character do not violate any provision of the Constitution of the United States, though a fair trade agreement "constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-Trust Act".

In this state of the law, proponents of, and protagonists for, the fullest scope for state fair trade statutes needed only the passage of a federal act relieving price maintenance contracts from the prohibitions of the Sherman Act. They did not need to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power, indeed in complete derogation of it, to do so. For the power to enact state fair trade laws derives not from the Congress, but from the inherent powers of the states.

In insisting, therefore, that the Miller-Tydings Amendment is ineffective to remove the prohibitions of the Sherman Act, as to non-signers, because it in terms refers to, and deals merely with, *price maintenance contracts which are valid by state law*, and does not in terms grant to the states power to make those laws effective against non-signers of such contracts, appellants wholly misconceive the issue.

[fol. 104] Likewise, appellees, when they devote a great part of their brief to the history of the act to demonstrate that it was the intent of Congress to cover laws binding non-signers, equally misconceive the issues, and take on a burden which they do not have to bear.

Agreeing, then, with appellants that the act is free from ambiguity and that there is no occasion to resort, or propriety in resorting, to its legislative history to find its meaning, we yet agree with appellees that, in comprehen-

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[8] *Pepsodent Co. & International* v. *Krauss Co.*, 9 So (2) 303; *Mennen Co. and Bristol-Meyers* v. *Krauss*, 134 F (2) 348.

sively and completely removing from the prohibitions of the Sherman Act *price maintenance contracts which are valid according to the law of a state*, the amendment removed every prohibition from, or impediment in the way of, the enactment by the states of fair trade laws, binding alike upon signers and non-signers.

This being so, it is wholly immaterial whether the Congress as a whole, or particular members of it,[9] in enacting the Miller-Tydings Amendment, did or did not have in mind that there were state acts applying to non-signers as well as signers and, therefore, did, or did not, have in mind the specific intent that the amendment should be effective as well against non-signers as against signers.

Read on its face and interpreted in accordance with that reading, what the amendment did was to remove all Sherman Act restrictions on agreements restraining trade in states where, by the state law, these agreements had been validated as to intrastate commerce. Thus a non-signer finding himself pursued under a fair trade act and without remedy as to intrastate transactions, is bound by the terms and wording of the amendment to find himself [fol. 105] equally without remedy as to interstate transactions. For when he invokes the Sherman Act to prevent the enforcement against him of the state law, he is referred to the Miller-Tydings Amendment of it with the inquiry, "What are you complaining of, the agreements which establish a fair price?" and the answer, "The Sherman Act as amended now validates them." If the non-signer answers, "No, I am not complaining of the agreements. I am complaining of the act of the state, which, though I did not sign them, requires me to respect those agreements, whereas the amendment of the Sherman Act, to which you refer, did not refer to, or authorize, state action against non-signers." "Sorry", replies the Sherman Act, "but the amendment neither authorizes nor prohibits state legislation. The control it exercises is not over, the effect it has is not upon, legislation by the states. It is concerned with, and only with, the Sherman Act, legislation by Congress affecting interstate commerce. The

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[9] Cf. *Fleming* v. *A. H. Belo Corp.*, 121 Fed (2) at p. 212-213.

amendment, removing from the prohibition of that act 'contracts or agreements prescribing minimum prices for the resale of a commodity' * * * 'when contracts or agreement of that description are lawful as applied to intrastate transactions under' any state law, was enacted to, it did remove the Sherman Act as an obstacle in the way of completely effective state action, and there is nothing, therefore, that the Sherman Act can do for you."

Whatever then may be our views as to the unwisdom of the policy lying back of fair trade acts and the Miller-Tydings amendment, we are in no doubt that the judgment was right, and must be affirmed.

[fol. 106] RUSSELL, Circuit Judge, dissenting:

As to two of the underlying questions which should control the disposition of this case, we are all in agreement. That is that the transactions were so much in interstate commerce as to be subject to the exercise of Congressional power in the regulation thereof and, also, that the provisions of the Miller-Tydings Amendment, relaxing the regulations in protection of interstate commerce evidenced by the Sherman Act,[1] are so clear as to render improper resort to the legislative history of that Amendment in applying its terms.[2] The sole point of difference between us therefore is the effect which should be given this amendment when read in the light of its unambiguous language.

It seems clear to me that the majority opinion enlarges and extends the provisions of the statute to a scope not justified by the legislative language. I can not agree that the amendment, merely by excepting from the prohibition of the otherwise illegal "contracts and agreements" forbidden by the Sherman Act, "contracts and agreements prescribing minimum prices * * * when *contracts* or *agreements* (italics supplied) of that description are lawful as applied to intrastate transactions" under the State law,

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[1] 16 U. S. C. A. §1-7.

[2] *Caminetti* v. *U. S.*, 242 U.S. 470; *Gemsco* v. *Walling*, 324 U.S. 244; *Ex Parte Collette*, 337 U.S. 55. *C. F. Sturges* v. *Crowninashield*, 15 U. S. C. A. §1-7.

likewise embraces within its exemption the provisions of any State *statute*, and this notwithstanding the only reference to such statute is that which might validate the "contracts and agreements." It may be further observed at this point, that the Miller-Tydings Amendment in no way sought to remove the prohibition against a "combination in the form of trust or otherwise, or conspiracy, in [fol. 107] restraint of trade or commerce among the several States."

The nature and purpose of the statute amended,—the Sherman Act,—requires that any amendment thereto which in anywise relaxes the statutory declaration of public policy should be strictly construed. As has been said, "the legislative purpose set forth in the general enactment expresses the legislative policy and only those subjects expressly exempted by the proviso should be freed from the operation of the statute."[3] Indeed, upon any basis, (except possibly from applying the statute, not as enacted, but upon conjecture which might arise from some features of its legislative history), it is difficult to perceive any basis for enlarging the plain meaning of its language. But we are all agreed that there is no occasion here for consideration of the legislative history of the Amendment, and therefore whatever may have been the intention of its sponsors, we are controlled by the amendment as actually enacted. The amendment deals only with "contracts and agreements" and in the absence of any enlarging provision, furnishes no basis for incorporating as an exemption from the Sherman Act any provision of a State Statute which restrains interstate commerce by provisions applicable to those who have not made the "contracts and agreements." My position is illustrated by the observation that the Miller-Tydings Amendment goes no further than to remove the taint of illegality attendant upon such contracts as to interstate transactions (*Dr. Miles Medical Co.* v. *Park and Sons Co.*, 220 U.S. 373) as is removed by section 1 of the Louisiana Act now in question as to intrastate transactions. Section 1 of the Louisiana Act relates, as likewise does the [fol. 108] Federal Act, only to establishing the legality of the *contracts* in question. That far, the two statutes are in

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[3] Sutherland on Statutory Construction, 3rd Ed. 1943, §4933; *U. S.* v. *Dickson*, 40 U.S. 141, 163.

pari materia. Section 2 of the Louisiana statute, upon which the present cause is predicated, is a substantive law of Louisiana, not a contract or agreement. I believe it may not be successfully contended that without section 2, the provisions of section 1 could be in any wise applied to retailers who had not seen fit to execute price maintenance contracts legalized by section 1. The terms of the Federal Amendment no more embrace section 2 of the Louisiana Act than does section 1 of that Act. Thus Congress has legalized the *contract* validated by the State law, but not every provision of the statute. If, over and beyond the establishment of the legality of the contractual obligation to maintain minimum prices, the State statute otherwise authorizes conduct or procedure which runs afoul of a Congressional protection of interstate commerce from unlawful restraint, such as the appellant defendant here asserts to be true as to him, such provision of the State statutes must yield to paramount Federal law.

It is not material whether the defense be declared predicated upon the lack of State power, or upon the ground that the enforcement of a State statute will result in a Federal Court of Equity basing the exercise of its injunctive power upon grounds which are illegal because of the Sherman Act. The result properly to be reached is the same, for the Federal Court must not require action which countenances conduct contrary to Federal law. In the present case, the Court could enforce section 1 of the Louisiana Act, but could not enforce that part of section 2 relating to non-contractors if, under the circumstances, such enforcement would be contrary to the Sherman Act. It is recog-
[fol. 109] nized that in this time when the weight of interstate commerce affects multitudinous transactions, the construction here given the Miller-Tydings Amendment greatly circumscribes the relaxation of Federal control in the enforcement of State Fair Trade Acts. However, we should apply the statute as written. This construction removes the legal difficulty to the enforcement of permissive contracts, themselves declared illegal in *Dr. Miles Medical Co.* v. *Park and Sons Co., supra,* and likewise makes it clear that the provision of the Amendment that the making of such contracts shall not be an unfair method of competition, removes further infirmity theretofore found inherent in such contracts. *Federal Trade Commission* v.

Beech-Nut Packing Co., 277 U.S. 441. If the Congress determines it wise to further relax the prohibitions of the Sherman Act, it can very easily do so by merely excepting from its operation all provisions of State Fair Trade Acts, including their planned restrictive operations against sales by those in no wise obligated by any contractual relation restriction.

It is also clear that as to those who have not executed contracts or agreements validated by the Amendment, there may be combinations or conspiracies in illegal restraint of trade which have a basis over and beyond that afforded by the execution of contracts and agreements as such. If so, such contracts being legally permitted, of course would not themselves evidence any illegality of agreement, but neither would they raise a sanctuary for those who, though parties to legal contracts, might illegally combine or agree to restrain interstate commerce so far as non-contractors are concerned. This was recognized by the parties and the trial Court. That Court, being of the opinion that the Miller-Tydings Amendment, construed in the light of its [fol. 110] legislative history, in effect adopted the State Fair Trade Statute (as do my colleagues, but without resort to legislative history), expressly found as a conclusion of law, "defendants have attempted to show that plaintiff's actions in fixing retail prices constitute a restraint of trade between the states. No finding on this feature of the case is required, however, in view of the Miller-Tydings Amendment to the Sherman Anti-Trust Act." For the reasons I have stated, I do not accept this view. The proper disposition of this case would require us to adjudge that the Court was in error in holding that the Amendment removed the protection of the Sherman Act from non-contractors. He should have considered and adjudged the defendants' contention that, as to them, non-contractors, the plaintiffs' conduct constituted an illegal restraint of commerce between the states, at the same time giving to the plaintiffs the benefit of the Amendment so far as applicable to parties entering into the permitted price maintenance contracts. We should not evaluate the facts, which must be done in order to apply the law, in the first instance. I would reverse the judgment of the trial Court with direction that the case be thus heard and concluded.

[fol. 111] JUDGMENT

Extract from the Minutes of July 27, 1950.

No. 13163

SCHWEGMANN BROTHERS, ET AL.,

versus

SEAGRAM DISTILLERS CORPORATION

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Schwegmann Brothers, and Others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"RUSSELL Circuit Judge, dissents."

[fol. 112] PETITION FOR REHEARING FILED—August 10, 1950

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 13,162

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

CALVERT DISTILLERS CORPORATION, Appellees

CONSOLIDATED WITH

No. 13,163

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

SEAGRAM-DISTILLERS CORPORATION, Appellees

PETITION FOR A REHEARING

Appellants in the above styled causes represent that they are aggrieved by the majority opinion filed July 27, 1950,

and petition this Honorable Court to grant a rehearing on the following grounds:

[fol. 113]

I.

Respectfully and with all due deference, appellants submit that the majority of this Honorable Court misconceived the principal issue of this litigation. The issue, as counsel see it, is not the effectiveness of the Miller-Tydings Amendment to relieve from the prohibitions of the Sherman Act resale price maintenance by *contract*. Rather, the issue is the effectiveness of the Amendment with respect to resale price maintenance over and beyond contracts —*against non-contracting parties*.

II.

In the trial of this case, in the argument before the District Court, in the briefs and in the argument before this Honorable Court, counsel for appellants and counsel for appellees did not differ as to what constitute the issues in this litigation. Counsel for appellants and apparently counsel for appellees had no notion that this Honorable Court would regard as the principal issue before it the question: "whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act resale price maintenance contracts". Prior to the filing of the majority opinion, this conception of the issue was expressed only by the Presiding Judge, briefly, without exposition, and then only in the course of the closing argument of counsel for appellees. It is respectfully submitted, therefore, that the determination of what really constitutes the issue was not given consideration by this Honorable Court commensurate with the importance of the case.

[fol. 114]

III.

There is a basic inconsistency in the majority opinion. The opinion states that the Miller-Tydings Amendment is plain and unambiguous. But the effect of the decision is that the word "contracts" as used in the Amendment does not mean contracts. *In effect, according to the majority opinion, "contractual" includes "non-contractual"—just as if "navigable" should include "non-navigable" and "negotiable" should include "non-negotiable".* According to the

majority opinion, non-contracting parties must bear the same burdens as contracting parties.

Counsel reiterate, and the Court has found, that the Amendment is plain and unambiguous. In its common meaning and in its technical legal meaning the term "contract" means an agreement, to do or to refrain from acts, between two or more persons, binding those persons and only those persons. Any other view of contracts ignores the meaning of the word and repudiates the long history of contracts as distinguished from status fixed by statute.

Wherefore, petitioners pray that this Honorable Court grant a rehearing in these causes and that it adopt the minority opinion as the majority opinion of this Court.

Respectfully submitted, (signed) Paul O. H. Pigman, Wisdom and Stone, John Minor Wisdom, Saul Stone, Paul O. H. Pigman, Attorneys for Appellants.

[fol. 115] BRIEF STATEMENT IN SUPPORT OF PETITION FOR REHEARING

I.

Respectfully, and with all due deference, it is submitted that the majority of this Honorable Court misconceived the issue in this litigation.

The majority opinion states that "both appellants and appellees, instead of coming and sticking" to the point of the case, set up "straw men", and then each "furiously . . . [layed] about to knock the other's straw man down." The "main battleground", according to the majority opinion, was:

> "whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act, the price maintenance contracts relied on in this case."

It is certainly true that appellants did not consider this an issue; nor did appellees. There has never been any doubt that the Amendment relieves resale price maintenance contracts from the Sherman Act. There has never been any dispute over the application of the Amendment to contracts, that is, the enforceability of resale price maintenance between contracting parties. The dispute is over the application of the Amendment to price-fixing over and

beyond contracts, that is, the enforceability of resale price maintenance against non-contracting parties.

This case was carefully prepared by counsel for both sides. Counsel for appellees were counsel for Pepsodent [fol. 116] Company in *Pepsodent* v. *Krauss*, 56 F. Supp. 922 (D. C. La. 1944). Judge Borah, author of the opinion in that case and now a member of this Honorable Court, based his decision on the legislative history of the Amendment. In the instant case, the District Court relied on *Pepsodent* v. *Krauss*. There is a manifest reason why appellees were so anxious to go into the legislative history.[1] Appellees feared that they would be out of Court, if restricted to the plain meaning of the Amendment. They had to go beyond the statute in search of some justification for asserting that an exception,[2] in terms limited to contracts, includes non-contractual resale price maintenance imposed by statute on third persons not parties to the contracts. As expressed in the minority opinion:

"Indeed, upon any basis (except possibly from applying the statute, not as enacted, but upon conjecture

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[1] Appellants reaffirm their position that the language of the Amendment is so clear that resort to the legislative history is improper. Appellants also reaffirm, however, that a study of the legislative history leads irresistibly to the conclusion that the Amendment was intended to validate resale price maintenance only against willing contracting parties. As conclusive proof one need go no further than a comparison of the Miller-Tydings Amendment and a typical Fair Trade Law. The Amendment tracks Section 1; it omits any reference to non-signers (Section 2). If one goes further, one finds that the reason for the omission of any reference to non-signers is that the Amendment substantially follows the Capper-Kelly bills introduced in Congress in 1927, 1928, and 1931—*prior to the existence of any non-signer clause in any state statute, and actually prior to the passage of any fair trade law at all.*

[2] It is respectfully submitted that the majority of this Honorable Court did not give sufficient weight to the principle of statutory construction that an exception to a declaration of public policy should be strictly construed.

which might arise from some features of its legislative history), *it is difficult to conceive any basis for enlarging the plain meaning of its language.*" (Italics supplied.)

[fol. 117] It is respectfully submitted that the majority of this Honorable Court erred in not recognizing as the real issue:

> "Can or does an exception to the Sherman Act covering 'contracts and agreements' be extended to cover non-contractual, statutory resale price maintenance imposed on non-signers by the substantive law of the state, not by contract or agreement—in transactions affecting interstate commerce?"

II.

The majority opinion states that "the proponents of . . . the fullest scope for state fair trade statutes needed only the passage of a federal act relieving . . . contracts from the . . . Sherman Act". Counsel respectfully submit that this reasoning begs the question, since it rests on the assumption that the meaning of contracts may be extended to include what, for lack of a better term, may be called non-contracts. If, however, as both the majority and minority of the Court agree, the legislative language is plain and unambiguous, the proponents of fair trade legislation needed something more than an exception for "contracts and agreements". As stated in the minority opinion, they needed an exception covering provisions of a state statute "applicable to those who have not made the contracts and agreements".

The Sherman Act unquestionably is an obstacle to resale price maintenance affecting interstate commerce. The Miller-Tydings Amendment removes that obstacle with respect to parties to a resale price maintenance contract. It does not follow, however, that removal of the obstacle [fol. 118] as to contracting parties has any effect on non-contracting parties.

The first Fair Trade statutes, from 1931 to 1933, validated, in intrastate transactions, resale price maintenance contracts between the parties *but contained no non-signer clause.* These contracts were ineffective against non-contracting retailers and did not accomplish their purpose of

eliminating price competition. In 1933, California added Section 2 to its Fair Trade Law, binding non-signers. Other states, including Louisiana, adopted Fair Trade laws which follow almost identically the language of the *amended* California statute. Section 2, the non-signer clause, does not validate the contracts; that was already accomplished by Section 1. Section 2 superimposes an independent statutory obligation that is outside of the legal concept of a contract. Proponents of price-fixing found it necessary to bind non-contracting parties by statute in an intrastate transaction; it is equally necessary to bind non-contracting parties by statute in an interstate tra-saction (for purposes of avoiding the Sherman Act).

The minority opinion makes a forceful and convincing point: it would have been simple for Congress to have excepted from the Sherman Act resale price maintenance in accordance with "all provisions of state Fair Trade Acts, including their planned restrictive operations against sales by those in no wise obligated by any contractual relation restriction". Congress did not. The Amendment excepts only the contract clause embodied in Section 1. The Amendment tracks Section 1, word for word, but omits any ref-[fol. 119] erence to non-signers (Section 2). As the minority opinion points out cogently:

> "I believe it may not be successfully contended that without Section 2, the provisions of Section 1 could be in any wise applied to retailers who had not seen fit to execute price maintenance contracts legalized by Section 1. The terms of the Federal Amendment no more embrace Section 2 of the Louisiana Act than does Section 1 of that Act. Thus Congress has legalized the contract validated by the State law, but not every provision of the statute . . . We should apply the statute as written."

III.

Apparently as a peripheral predicate for its conclusion, the majority opinion makes several references to the inherent power of the states to enact Fair Trade legislation, for example:

> "[It was not necessary] to seek from Congress permission or authority to enact fair trade statutes. It

would have been a complete misconception of the source of state power . . . In insisting, therefore, that the Miller-Tydings Amendment is ineffective . . . as to non-signers, because it . . . does not in terms grant to the states power to make those laws effective against non-signers of such contracts, appellants wholly misconceive the issue."

Appellants do not question a state's power to enact Fair Trade legislation, regulating intrastate transactions, against signers and non-signers. But a state's authority is limited by the commerce clause of the United States [fol. 120] Constitution, the Sherman Act and any other federal statute in the field of interstate commerce. Proponents of the legislation found it necessary to secure a federal exception covering contracts; the state's inherent powers did not protect contracts in restraint of interstate trade, regardless of the validity of such contracts under state law. For the same reason that it was necessary to except contractual resale price maintenance from the Sherman Act, it is necessary also to except non-contractual resale price maintenance independently imposed by state statute on non-signers—regardless of a state's inherent intrastate power.

IV.

With respect and deference, counsel for appellants confess an inability on their part to understand the reason for the conclusion expressed in the majority opinion.

If the majority opinion is analyzed and an effort is made to reduce it to the terms of a syllogism, one would find as a major premise that the Amendment removes Sherman Act restrictions, in transactions affecting interstate commerce, on contracts which are valid in intrastate transactions. Appellants do not dispute this premise. The stated conclusion is: since a non-signer is bound in an intrastate transaction, he is also bound in an interstate transaction. The major premise, standing alone, does not support the conclusion, for the reason that there is no necessary relationship between a fair trade contract validating resale price maintenance by the contracting parties and an independent statutory provision imposing resale price maintenance on non-contracting parties.

[fol. 121] There is no express minor premise to close the hiatus between the major premise and the conclusion. As a matter of fact, no minor premise can be formulated to support the conclusion if, as is agreed, the Amendment plainly and unambiguously refers only to "contracts or agreements".

Counsel for appellants do not contend that all reasoning must be syllogistic or that an opinion of this Honorable Court to be sound must be capable of being subjected to the formalism of a syllogism. Counsel do contend, most respectfully, that against the yardstick of a syllogism, or, as stated in the minority opinion, "upon any basis (except possibly . . . conjecture which might arise from features of its legislative history)", the majority opinion is unclear.

V.

The decision rendered in this case is a major one in American jurisprudence, one that will be studied, analyzed, and weighed by all interested in the legal aspects of restraint of trade, statutory construction, and the interplay of intrastate and interstate transactions. But its greater importance lies in the field of practical economics. The decision will have a direct effect on the merchandising methods of retailers who, like Schwegmann Brothers, by efficient operations, a volume business, and a serve-yourself system, are able to reduce their costs and pass on corresponding savings to customers. The decision will be a green light for manufacturers and distributors who have refrained from fair trading their products for fear of just such litigation as this litigation. It will have a direct effect on customers who will have to pay more for their [fol. 122] goods than the goods are worth in a free market. In normal times this would be serious enough. In the present crisis detonated by the Korean war, perhaps the first of many crises or the start of one of long duration, in a period of rapidly rising costs of living, the danger of inflation omnipresent—the seriousness of a decision broadening the scope of a statute inherently inflationary multiplies in geometric progression.

Counsel would not presume even to intimate that these effects should enter into the Court's consideration of the *merits* of this cause. Counsel do urge, earnestly and re-

spectfully, that the inescapable economic effects of the decision underscore the urgency of appellant's petition for rehearing and warrant a reexamination of the correctness of the majority opinion.

Respectfully submitted, (singed) Paul O. H. Pigman, Wisdom and Stone, John Minor Wisdom, Saul Stone, Paul O. H. Pigman, Attorneys for Appellants.

This is to certify that on the 9th day of August, 1950, I served personally on the attorneys for the appellee, the petition for rehearing and brief statement in support of the petition.

(signed) Paul O. H. Pigman, Attorney for Appellant.

This is to certify that this petition is filed in good faith and not for purposes of delay.

(signed) Paul O. H. Pigman.

[fol. 123] ORDER DENYING REHEARING

Extract from the Minutes of September 15, 1950.

No. 13163

SCHWEGMANN BROTHERS, ET AL.,

versus

SEAGRAM DISTILLERS CORPORATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.

RUSSELL, Circuit Judge, Specially Concurring:

Since my Brethern remain firm in their original opinion, no purpose could be served by the grant of a rehearing, and I therefore concur in the order denying the same.

[fol. 124] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 125] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 443

ORDER ALLOWING CERTIORARI—Filed February 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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DEC 8 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Counsel for Petitioners.

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† Latter citation is to Louisiana Revised Statutes of 1950, effective May 1, 1950. The Revised Statutes reenacted, in substantially identical form, Act 13 of 1936. The decisions below involve interpretation of the original Act 13 of 1936, and citations herein refer to this statute in its original form.

CITATIONS—Continued.

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4. Other Authorities.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. .....

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. .....

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petition of Schwegmann Brothers, a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, and of the individual partners, prays that writs of certiorari issue to review the

judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cases on July 27, 1950. A petition for rehearing filed August 10, 1950 (Seagram R. 112, Calvert R. 118) was denied September 15, 1950 (Seagram R. 123, and Calvert R. 129). The cases were consolidated by the Court of Appeals for briefing and argument (Seagram R. 93, Calvert R. 99), and one opinion was rendered by that Court. Though the cases are separately docketed in this Court, one petition is filed for two writs of certiorari.

OPINIONS BELOW

The judgment, findings of fact, and conclusions of law of the District Court are printed in the record (Calvert R. 83 *et seq.*, Seagram R. 79 *et seq.*). The opinion of the United States Court of Appeals (Seagram R. 97 *et seq.*, Calvert R. 103 *et seq.*) is reported in 184 F. (2d) 11.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S.C., Section 1254 (1).

STATUTES INVOLVED

The pertinent statutes are the Sherman Anti-Trust Act (Act of July 2, 1890, Ch. 647, Sec. 1, 26 Stat. 209, 15

U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) and the Louisiana Fair Trade Act (Act 13 of 1936, La. R. S. 51:391-396). The pertinent statutory provisions are printed in Appendix A.

QUESTION PRESENTED

The question presented turns on the meaning of the Miller-Tydings Amendment: Does an exception to the Sherman Act, in terms limited to resale price maintenance by "contracts or agreements," i.e., contractual resale price maintenance, include resale price maintenance imposed by the substantive law of a state, not by contract or agreement, on unwilling non-contracting parties in transactions affecting interstate commerce?

STATEMENT OF THE CASE

The Louisiana Fair Trade Act, on which the complaints are predicated, is typical of fair trade statutes in forty-five states. It has two basic provisions. Section 1 provides that a *contract* shall not be invalid by reason of resale price-fixing provisions. Section 2, *the non-signer clause*, imposes resale price-fixing on non-contracting retailers.[1]

[1] Only Missouri, Texas, Vermont, and the District of Columbia have not enacted fair trade laws. See 2 CCH Trade Reg. Serv. (9th Ed.) Para. 7011 *et seq.* In the forty-five states which have adopted fair trade laws, the non-signer provision appears in almost identical form. The non-signer clause of the Louisiana Fair Trade Act provides: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." La. Act. 13 of 1936, §2.

Petitioners operate a super-market in New Orleans. They sell meat, vegetables, groceries, drugs, light hardware—and alcoholic beverages in packages. By an efficient operation, a volume business on a self-service, cash-and-carry basis, and hard work by the owners themselves, petitioners are able to reduce their costs and pass on corresponding savings to their customers. Petitioners have been successful in a highly competitive field.

Calvert Distillers Corporation, complainant-appellee, alleged that the fair trade price for a fifth of "Calvert Reserve" is $4.24; that Schwegmann Brothers sold it for $3.35. (Calvert R. 10.) Seagram-Distillers Corporation, complainant-appellee, alleged that the fair trade price for a fifth of "Seagram's 7 Crown" is $4.24; that Schwegmann Brothers sold it for $3.51. (Seagram R. 10.) Complainants filed suit in the United States District Court for the Eastern District of Louisiana to enjoin defendants from selling Calvert and Seagram products for less than the minimum prices fixed in fair trade contracts between complainants and certain Louisiana retailers.[2] The complaints were based on the non-signer clause (Section 2) of the Louisiana Fair Trade Act: complainants did not pretend to have any contractual relationship with defendants. John Schwegmann, Jr. admitted the sales; testified that he had never signed any fair trade contract; stated that his policy was to buy cheaply, to operate economically, and to pass on savings to consumers. (Calvert R. 67-68.)

[2] For purposes of trial, the causes were consolidated and a stipulation entered that exhibits and testimony should be considered applicable in both causes, insofar as relevant. Seagram R. 26, *et seq.*

The Louisiana price-fixing actions of each complainant were an inseparable element of an integrated, uniform, nation-wide, price-fixing program involving interstate transactions and dependent for its success upon activities affecting interstate commerce. The District Court had no doubt as to the interstate character of the transactions involved. (Calvert R. 48.) The Court of Appeals was of the same opinion: "... the transactions, the subject of this suit, so affect interstate commerce and the exertion of the power of Congress over it as to bring plaintiffs' activities within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them."

Petitioners contend that price-fixing applied to non-contracting retailers is an unlawful restraint of trade.[3] The argument against this contention invokes the Miller-Tydings Amendment which excepts from the Sherman Act "*contracts or agreements,*" valid under state laws, fixing resale prices. Before the District Court, the Court of Appeals, and now this Court, petitioners have consistently maintained that the Miller-Tydings Amendment means exactly what it says—the exception applies only to *contractual* price-fixing; it cannot be extended to immunize non-contractual price-fixing. Petitioners' position rests on two main arguments:

(1) The language of the Amendment is so clear and unambiguous, the court should not resort to extrinsic aids to determine the legislative intent; however,

[3] Resale price-fixing *per se* violates the Sherman Act because it tends to eliminate competition. *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 296, 65 S. Ct. 661, 663 (1945); *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 60 S. Ct. 811 (1940). See also *United States v. Masonite Corporation*, 316 U. S. 265, 62 S. Ct. 1070 (1942); *United States v. Univis Lens Co., Inc.*, 316 U. S. 241, 62 S. Ct. 1088 (1942); *United States v. Trenton Potteries Company*, 273 U. S. 392, 47 S. Ct. 377 (1927); *United States v. A. Shrader's Sons, Inc.*, 252 U. S. 85, 40 S. Ct. 251 (1920).

(2) A careful study of the legislative history and other sources proves that Congress did not intend the Amendment to be applicable to resale price maintenance against non-contracting parties.

The District Court rendered judgment in favor of complainants, in reliance on *Pepsodent v. Krauss*, 56 F. Supp. 922 (D. C., E. D. La. 1944) the only reported case passing on the questions presented in this petition. In that case the court examined the legislative history of the Miller-Tydings Amendment and concluded that Congress was aware of the existence of the non-signer provision in state fair trade acts and therefore must have intended the Amendment to apply to non-signers.

In the Court of Appeals the majority and minority opinions conceded that the Miller-Tydings Amendment "is free from ambiguity and that there is no occasion to resort, or propriety in resorting, to its legislative history to find its meaning." The majority of the court below, however, held that the Miller-Tydings Amendment not only removed Sherman Act prohibitions from resale price maintenance contracts entered into pursuant to state law but also permitted enforcement of resale prices against non-contracting parties, in transactions affecting interstate commerce.[4] The dissenting opinion expressed strongly the view that "the majority opinion enlarges and extends the provisions of the statute to a scope not justified by the legislative language."

[4] The opinion stated that lifting of Sherman Act prohibitions of resale price maintenance contracts removed "every prohibition from, or impediment in the way of, the enactment by the states of fair trade laws, binding alike on signers and non-signers." The fallacy of the Court is to treat the problem as one of authority of the states *to enact* fair trade laws, while the problem actually is the *enforceability* of fair trade contracts, valid under state law, against a non-contracting party in an interstate transaction. See page 9.

REASONS FOR GRANTING THE WRITS

(1) The decision of the court below is one of major importance to all interested in the legal aspects of restraint of trade and statutory construction. But of greater importance are the practical aspects of its impact in the field of economics.[5] This case involved the price of a bottle of Calvert and a bottle of Seagram; the principle involved will affect the price of food, drugs, clothing, and other necessities of life.[6] The decision will have a stultifying effect on merchandising methods of hundred of thousands of independent retailers who, like Schwegmann Brothers, by efficient management of a minimum-service business, are able to reduce their costs and pass on corresponding savings to consumers. The decision of the court below stimulates price-fixing by thousands of manufacturers and distributors who until now have refrained from attempting to enforce resale price maintenance against non-signers in transactions affecting interstate commerce. The decision has an immediate and continuing adverse effect on 140 million consumers in forty-five states who must pay more for the goods they buy than the goods are worth in a free market. In normal times this would be serious enough. In the present crisis detonated by the Korean war, perhaps

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[5] For well documented discussions of the economic aspects of fair trade legislation, see *Report on Resale Price Maintenance of Federal Trade Commission—Submitted to Congress December 13, 1945;* Grether, *Price Control Under Fair Trade Legislation* (1939); Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, 24 Cal. L. Rev. 640 (1936); Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24 (1949).

[6] For two recent critical discussions of the breadth of fair trade coverage and the adverse economic effects of fair trade on the price structure, see Fortune Magazine, *The Not-So-Fair Trade Laws* (January 1949) and Fortune Magazine, *The "Fair" Trade Controversy* (April 1949).

the first of a long series of crises or the start of one of long duration, in a period of rapidly rising costs of living, the danger of inflation omnipresent—the seriousness of a decision broadening the scope of a statute inherently inflationary increases in geometric progression.[7]

(2) The meaning of the Miller-Tydings Amendment, has not been clarified by the majority opinion of the court below—with all due deference and respect for the learned court.

(a) Both the majority and minority of the court below were of the opinion that the Amendment was clear and unambiguous, so plain that it would be improper to examine legislative history. Yet the Amendment meant one thing to the majority of the court, an entirely different thing to the minority of the court. As used in the Amendment, the term "contracts or agreements" would seem to be clear and unambiguous. But as construed in the majority opinion, "contracts" does not mean contracts. In effect, "contractual" includes non-contractual—just as if the term "negotiable instruments" in a statute includes non-negotiable instruments. According to the majority opinion, non-contracting parties bear the same burdens as contracting parties.

[7] "If the whole direction of resale price maintenance must be to favor the less efficient retailer and to block the use of standard techniques in aggressive and economical merchandising, then the end result must be that Fair Trade laws raise prices on Fair Traded goods." Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24, 50 (1949). The Federal Trade Commission *Report on Resale Price Maintenance* points out that ". . . price increases [resulting from fair trade legislation] fell most heavily upon those consumers who from necessity or personal choice patronize minimum-service stores."

(b) The majority opinion states that the "main battleground" is "whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act, the price maintenance *contracts* relied on in this case." It is believed that the court below misconceived the issue. There has never been any dispute over the application of the Amendment to contracts, that is, the enforceability of resale price maintenance between contracting parties. The dispute is over the application of the Amendment to price-fixing over and beyond contracts, that is, the enforceability of resale price maintenance against non-contracting parties.

(c) The court below makes several references to the inherent power of states to enact fair trade statutes; for example, the court states that "in insisting that the Miller-Tydings Amendment is ineffective . . . as to non-signers, because it . . . does not in terms grant to the states power to make those laws effective against non-signers of such contracts, appellants wholly misconceive the issue." Petitioners do not question a state's power to enact fair trade legislation. But a state's authority is limited by the commerce clause of the United States Constitution and the Sherman Act in transactions affecting interstate commerce.[8] Proponents of the legislation found it necessary to secure the Miller-Tydings exception for contractual resale price maintenance; the state's inherent powers did not protect contracts in restraint of interstate trade. For the same reason—a specific exception is needed for non-contractual resale price maintenance.

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[8] U. S. Const., Art. 1; *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 65 S. Ct. 661 (1945); *cf. H. P. Hood and Sons v. Dumond*, 336 U. S. 525, 69 S. Ct. 657 (1949).

(d) The Miller-Tydings Amendment merely excepts from the Sherman Act "contracts or agreements," otherwise illegal,[9] fixing minimum resale prices, when such contracts are lawful as applied to intrastate transactions under state law. The majority of the Court, however, reached the sweeping conclusion that the Amendment "removed every prohibition from, or impediment in the way of, the enactment by the states of fair trade laws, binding alike upon signers and non-signers." It is believed that the correct view is that stated in the minority opinion:

> "The amendment deals only with 'contracts and agreements' and in the absence of any enlarging provision, furnishes no basis for incorporating as an exemption from the Sherman Act any provision of a state statute which restrains interstate commerce by provisions applicable to those who have not made the 'contracts and agreements'."

(3) Petitioners believe that the Miller-Tydings Amendment is so clear that there should be no resort to extrinsic aids to determine its meaning.[10] However, a careful study

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[9] The first attempts at resale price maintenance were made under the copyright laws by attempts to analogize the rights of a copyright owner to those of a patent owner. This Court held that copyright laws do not give the right to control future retail sales. *Bobbs Merrill Co. v. Strauss*, 210 U. S. 339, 28 S. Ct. 722 (1908). Subsequently, attempts were made to coerce retailers into maintaining resale prices by means of contracts. Although the mechanics of these schemes varied, in general they involved a contract between a manufacturer and a retailer fixing minimum resale prices. In the leading case of *Dr. Miles Medical Co. v. John D. Parke & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376 (1911), the Supreme Court outlawed resale price maintenance contracts, a decision that retained its vitality until the passage of the Miller-Tydings Act. This Court reiterated this principle in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139 (1936), upholding the constitutionality of the Illinois and California Fair Trade Acts.

[10] See *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192 (1917), and *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 57 S. Ct. 77 (1936), in which the plain meaning of a statute was applied, although a different result would have been reached had

of the legislative history and other sources demonstrates, as stated in the minority opinion, that:

> "... the Miller-Tydings Amendment goes no further than to remove the taint of illegality attendant upon such contracts as to interstate transactions (Dr. Miles Medical Co. v. Park & Sons, 220 U. S. 373) as is removed by section 1 of the Louisiana Act now in question as to intrastate transactions... The terms of the Federal Amendment no more embrace Section 2 of the Louisiana Act than does Section 1 of that Act."

(a) The Miller-Tydings Amendment parallels, word for word, Section 1, the contract provision, of a typical fair trade law but has no language analogous to Section 2, the non-signer provision, and omits any reference to resale price maintenance against non-contracting parties. The substantive identity and the close formal relationship between the Miller-Tydings Amendment and Section 1 of a typical fair trade law is apparent from a comparison of these statutory provisions which are printed in parallel columns in Appendix B.

(b) The Miller-Tydings Amendment is almost identical with H. R. 1611 and S. 100 of the 75th Congress, 1st Ses-

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the Court relied on legislative history. Recently this Court stated: "The argument from the legislative history undertakes, in effect, to contradict the terms of Section 8 (f) . . . The plain words and meaning of a statute cannot be overcome by a legislative history which . . . may furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling*, 324 U. S. 244, 260, 65 S. Ct. 605, 614-115 (1945). Last year this Court reasserted this principle, citing the *Gemsco* case, in the following language: "Petitioners' chief argument proceeds not from one side or the other of the literal boundaries of Section 1404 (a) [of the Judicial Code], but from the legislative history. *The short answer is that there is no need to refer to the legislative history where the statutory language is clear* . . . This canon of construction has received consistent adherence in our decisions." (Italics supplied.) *Ex Parte Collett*, 337 U. S. 55, 61, 69 S. Ct. 944, 947 (1949).

sion, which in turn were virtually identical with S. 3822 of the 74th Congress, 2nd Session.[11] This latter bill was introduced January 27, 1936, before the decision in *Old Deaborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139 (1936), and less than three years after the first enactment of a non-signer provision, at a time when there were only about a dozen states with fair trade acts. S. 3822 and, of course, its derivative bills, are substantially identical with the Capper-Kelley bill, introduced in Congress in 1927, 1928, and 1931.[12] At that time there were no statutes with non-signer provisions in existence. Indeed, there were no fair trade laws.[13] All of these bills, and others which might be cited, go back to the Stevens bill in 1914,[14] which was drafted and advocated simply to overcome the effect of the *Dr. Miles* case.

(c) Petitioners believe that an objective weighing of all the reports and congressional debates impels one to conclude that the intent of Congress was to authorize only permissive resale price maintenance contracts which buyer and seller could enter into "if they want to do so."[15] There was no congressional intent to except from the Sherman Act non-contractual resale price maintenance imposed on unwilling, non-contracting parties. See Appendix C, Summary of Legislative History of Miller-Tydings Amendment.

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[11] *Compare* 80 Cong. Rec. 8433 *with* 81 Cong. Rec. 2133. The Senate Committee Report stated that, since S. 100 (75th Cong., 1st Sess.) was "similar" to S. 3822 (74th Cong., 2d Sess.), the report on S. 3822 (S. Rep. No. 2053, 74th Cong., 2d Sess.) of the previous Session of Congress was applicable to S. 100, under consideration by the Committee. S. Rep. No. 257, 75th Cong., 1st Sess. See also H. R. Rep. No. 382, 75th Cong., 1st Sess.

[12] The text of the Capper-Kelley bill, as introduced in 1931, is contained in H. R. 11, 71st Cong., 3d Sess.

[13] California enacted the first fair trade law in 1931. The first non-signer clause was added by amendment in 1933.

[14] H. R. 13305, 63d Cong., 2d Sess. See also the "Metz" bill, H. R. 13860, 63d Cong., 2d Sess.

[15] 81 Cong. Rec. 8140, 8141.

(4) The opinion of the court below "enlarges and extends the provision of the statute to a scope not justified by the legislative language." [16] Such an interpretation is contrary to the settled principle of statutory construction that an exception or proviso should be narrowly construed.[17] The opinion of the court below might be simply of unusual academic interest as a departure from accepted principles of statutory construction. But it is more. The court construed the Sherman Act, the statute which officially commits the federal government to defend a competitive economy and embodies what is probably the most important statement of principles in the American philosophy of free enterprise. The Miller-Tydings Amendment is relatively new. The advocates of resale price-fixing for thirty years submitted bill after bill to Congress before they were successful in obtaining an exception for resale price maintenance contracts.[18] The Amendment is clearly in derogation of the philosophy of the Sherman Act, "an unjustified reversal of policy . . . an aberration, fostered, and propelled by a minority pressure group.[19] Critics in

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[16] Minority opinion. Seagram R. 106; Calvert R. 112.

[17] Sutherland on Statutory Construction (3d Ed. 1943), Sections 4830, 4933. Section 4933 states: ". . . The legislative purpose set forth in the general enactment expresses the legislative policy *and only those subjects expressly exempted by the proviso should be freed from the operation of the statute.*" See, for example, *United States v. Dickson*, 15 Pet. (40 U. S.) 141 (1841); *United States v. Maryland Casualty Co.*, 49 F. (2d) 556 (CCA 7, 1931).

[18] The Miller-Tydings Act found its way into the law in the closing days of the legislative session of the Seventy-Fifth Congress as a rider to a District of Columbia Appropriation Bill (H. R. 7472), after Congress had failed to act on fair trade bills previously introduced, reported, and debated. When the bill reached the President's desk for signature, a veto of the bill would have handicapped the operation of the City of Washington. President Roosevelt had consistently opposed such legislation and, when he signed the bill, he expressed the hope that the act "will not be as harmful as most people predict." N. Y. Times, Aug. 19, 1937, p. 26, col. 1.

[19] Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24, 54 (1949). Another authority has been equally critical: "These [fair trade] laws are completely inconsistent with the philosophy of free enterprise and the pattern of our other legislation. They disregard the interest of the consumer in price competition, protect a particular class of producers and favor the inefficient, high cost distributor rather than the efficient seller." Loevinger, *Law of Free Enterprise* (1948), p. 283.

high places have condemned the Amendment.[20] It is in the public interest that the limits of such an exception to fundamental national policy be surveyed and clearly marked by this Court.

CONCLUSION

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners.

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[20] The Federal Trade Commission and the Department of Justice opposed enactment of the Miller-Tydings Amendment when it was pending before the Congress, and now stand in favor of its repeal. *On the verge of World War II*, the Department of Justice recommended "the repeal of the Miller-Tydings Amendment . . . Already the record shows that it does not serve the purposes which were urged upon Congress as a reason for its passage, that it sanctions arrangements inconsistent with the purpose of the antitrust laws, and that it becomes a cloak for many conspiracies in restraint of trade which go far beyond the limits established in the amendment." The Consumer Commissioner of the National Defense Advisory Commission "strongly urged" the repeal of the Amendment. The Temporary National Economic Committee approved the following recommendation: "The Miller-Tydings Enabling Act, which legalizes resale price maintenance contracts in interstate commerce, results in some of those economic and social practices to be expected from private price-fixing conspiracies. The legal sanction of such practices tends to undermine the basic tenets of a competitive economy and introduces rigidities into the pricing of certain goods which restrain trade. Consequently, we recommend to the Congress the repeal of the Miller-Tydings Enabling Act." *Federal Trade Commission Report on Resale Price Maintenance*, (1945), LX-LXIV. Condemnation has continued. See *Third Annual Report to the President by Council of Economic Advisors;* Bergson, *Current Problems in the Enforcement of the Anti-Trust Law*, Address to Bar Ass'n of the City of New York, Feb. 17, 1949; N. Y. Times, Feb. 18, 1949, p. 19, col. 1.

APPENDIX A

PERTINENT STATUTES

Louisiana Fair Trade Act

AN ACT.

To protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

Section 1. Be it enacted by the Legislature of Louisiana, That *no contract* relating to the *sale* or *resale* of a commodity which bears, or the label or content of which bears, the trade mark brands, or name of the *producer or owner* of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:

1. That the *buyer* will not *resell* such commodity except at the *price stipulated by the vendor.*

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, *resell* except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed *to contain or imply conditions* that such commodity *may be resold* without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Section 2. *Wilfully* and *knowingly* advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is *unfair competition* and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. The following terms, as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

Section 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Section 6. This Act may be known and cited as "Fair Trade Act." Approved by the Governor: June 26, 1936.

Sherman Anti-Trust Act, as Amended by Miller-Tydings Amendment

Every contract, *combination in the form of trust or otherwise*, or conspiracy, in *restraint of trade* or commerce

among the several States, or with foreign nations, is hereby declared to be illegal; *Provided*, That nothing contained in sections 1-7 [the Sherman Act] of this title shall render illegal, *contracts or agreements* prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, *when contracts or agreements* of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, *and the making of such contracts or agreements* shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further*, That the preceding proviso shall not make lawful *any contract or agreement*, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX B

COMPARISON OF TYPICAL FAIR TRADE LAW AND MILLER-TYDINGS ACT

Louisiana Fair Trade Act.	Miller-Tydings Act.
(1) No contract relating to the sale or **resale of a commodity which bears, or the label or** content **of which bears, the trade mark brand, or name of the producer** or owner **of such commodity, and which is in** fair **and open competition with commodities of the same general class produced by others** shall be deemed in violation of any law of the State of Louisiana . . .	Nothing contained in [the Sherman Act] shall render illegal contracts or agreements prescribing minimum prices for the **resale of a commodity which bears, or the label or** container **of which bears, the trade mark, brand, or name of the producer or** distributor **of such commodity, and which is in** free **and open competition with commodities of the same general class produced** or distributed **by others,** when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale . . .
(2) Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable . . .	

NOTE: Bold face indicates identity between statutes.

APPENDIX C

SUMMARY OF LEGISLATIVE HISTORY OF MILLER-TYDINGS AMENDMENT

(1) The Miller-Tydings Amendment tracks almost exactly Section 1 of a typical fair trade law but omits any reference to Section 2, the non-signer provision.

(2) With all the legislation introduced, the only author to speak was Senator Tydings. He interpreted each of two bills. He made no mention of the non-signer clause or of any intention to make the Amendment effective against non-contracting parties. On the contrary, tracking the language of the *Old Dearborn* case upholding Section 1, Senator Tydings explained that his bill was simply to authorize permissive contracts. 81 Cong. Rec. 7496.

(3) In none of the original reports of the Congressional Committees of the 75th Congress which considered H. R. 1611 and S. 100 (the immediate sources of the Miller-Tydings Amendment), and in none of the reports of the Congressional Committees of prior Sessions of Congress, which considered proposed legislation substantively identical with H. R. 1611 and S. 100, is the non-signer clause discussed as included in the immunity granted contractual resale price maintenance by the proposed legislation. S. Rep. No. 2053, 74th Cong., 2d Sess.; S. Rep. No. 257 and H. R. Rep. No. 382, 75th Cong, 1st Sess. *Cf.* S. Rep 879, 75th Cong, 1st Sess.

(4) Of the numerous members of both Houses who spoke on the proposed legislation, the large majority referred to the purpose of the legislation as one to author-

ize "contracts or agreements" in the ordinary and usual sense, without reference to resale price maintenance imposed by statute on non-contracting parties. See, for example, 80 Cong. Rec. 8433; 81 Cong. Rec. 7487, 7489, 7495, 7496, 8139, 8140. One member referred to the non-signer clause so that it might be inferred from his reference that the other members may have been appraised of the provision. 81 Cong. Rec. 7491. Aside from this reference, only one other member presented directly in the debate his thought that the pending legislation would make the non-signer clause effective *quoad* interstate commerce. 81 Cong. Rec. 8143.

(5) The Miller-Tydings bill evolved from the Stevens bill, introduced in 1914, and the Capper-Kelley bills, introduced in 1927, 1928, and 1931, before the enactment of the first non-signer provision. The purpose of the Stevens and Capper-Kelley bills was to write into the law the minority opinion in the then recent *Dr. Miles* case. See footnote 9. As Justice Holmes, however, was careful to point out in the minority opinion: "There [was] no attempt to attach a contract or condition to the goods . . . The only question [was] whether the law forbids a purchaser to contract with his vendor that he will not sell below a certain price . . ." Some members of Congress, and the House Committee Report on H. R. 1611, specifically stated that the Amendment to the Sherman Act was intended to permit contracts otherwise illegal in interstate commerce under that decision. H. R. Rep. 382, 75th Cong., 1st Sess. One House Member specifically stated: "The measure complements existing state law and will make legal what was condemned by the Supreme Court in 1910 in the case of *Dr.*

Miles Medical Co. v. Parke & Sons Co., (220 U. S. Rep. 373). The report of the proponent of the bill, Mr. Miller, calls attention to the opinion of Justice Sutherland [in the *Old Dearborn* case], upholding the constitutionality of the Illinois Price-Fixing Act. The House will be interested to know that such price-fixing acts supplemented by this legislation *will write into the law the minority opinion of Mr. Justice Holmes, filed in the Miles case.* Mr. Justice Holmes' language in this dissenting opinion was vigorous and incisive, and *the principle laid down in his dissenting opinion is the genesis of this pending measure . . .*" 81 Cong. Rec. 8139, 8140.

(6) At the time the Administration objected to the provisions of S. 100 and H. R. 1611 on the ground that they might be construed to bind non-signers, the proposed legislation authorized contracts "prescribing minimum resale prices or other conditions." The phrase "or other conditions" was then removed, presumably to meet this objection. Thereupon Senator Tydings stated that he had conferred with the Administration and that the proposed legislation (plus a clause prohibiting horizontal agreements) obviated the objections raised by the Administration. 81 Cong. Rec. 7487.

This is to certify that copies of this petition have been served on counsel for respondents on this the .... day of December, 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS.

JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONERS.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Calvert R. 102-112, Seagram R. 96-106) is reported in 184 F. (2d) 11.

JURISDICTION

The judgment of the Court of Appeals was entered July 27, 1950 (Calvert R. 102, Seagram R. 96). A petition for rehearing filed August 10, 1950 (Calvert R. 114, Seagram R. 107) was denied September 15, 1950 (Calvert R. 122, Seagram R. 115). A petition for writs of certiorari was filed December 8, 1950 and was granted February 26, 1951. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

STATUTES INVOLVED

The pertinent statutes are the Sherman Anti-Trust Act (Act of July 2, 1890, Ch. 647, Sec. 1, 26 Stat. 209, 15 U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) and the Louisiana Fair Trade Act (La. Act 13 of 1936, La. R. S. 51:391-396). These statutes are printed in Appendices A and B. pp. 59-61.

QUESTION PRESENTED

The Miller-Tydings Amendment excepts from the Sherman Act resale price maintenance by "contracts or agreements". Does this exception extend to resale price maintenance imposed on unwilling, non-contracting parties under the non-signer clause of the Louisiana Fair Trade Act?

STATEMENT OF THE CASE

The Louisiana Fair Trade Act, on which the complaints are predicated, is typical of fair trade statutes in forty-five states. It has two basic provisions. Section 1, *the contract clause*, provides that a contract shall not be invalid by reason of resale price-fixing provisions. Section 2, *the non-signer clause*, imposes resale price-fixing on non-contracting retailers.[1]

Petitioners operate a super-market in New Orleans. They sell meat, vegetables, groceries, drugs, light hardware—and alcoholic beverages in packages. By an efficient operation, a volume business on a self-service, cash-and-carry basis, and hard work by the owners themselves, petitioners are able to reduce their costs and pass on corresponding savings to their customers. Petitioners are successful in a highly competitive field.

Calvert Distillers Corporation, respondent, a Maryland corporation, is a wholly-owned subsidiary of Calvert Distilling Corporation, also a Maryland corporation (Calvert R. 3). Seagram-Distillers Corporation, respondent, a Delaware corporation, is a wholly-

[1] Only Missouri, Texas, Vermont, and the District of Columbia have not enacted fair trade laws. See 2 CCH Trade Reg. Serv. (1950) Para. 7011 *et seq.* In the forty-five states which have adopted fair trade laws, the non-signer provision appears in almost identical form. The non-signer clause of the Louisiana Fair Trade Act provides: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, *whether the person so advertising, offering for sale or selling is or is not a party to such contract*, is unfair competition and is actionable at the suit of any person damaged thereby." La. Act 13 of 1936, Sec. 2; R. S. 51:392.

owned subsidiary of Joseph Seagram & Sons, Inc., an Indiana corporation (Seagram R. 3). Distillers Corporation—Seagrams, Ltd., the Canadian holding company for Calvert, Seagram, Old Frankfort, and Carstairs subsidiaries, is one of four distilling companies which, according to the Federal Trade Commission, together produce about two-thirds of all distilled whiskey manufactured in the United States. *FTC Report on Resale Price Maintenance* (1945), p. 337. The whiskies are distilled in Kentucky and in other states. The distributors neither manufacture nor warehouse goods in Louisiana (Calvert R. 46, Seagram R. 39). Orders are received from Louisiana wholesalers and forwarded to St. Louis and New York for processing (Calvert R. 47, Seagram R. 35). Each distributor operates through an "exclusive" wholesaler (Seagram R. 35, Calvert R. 45) who, working closely with the distributor's representative, sells the retailers (Calvert R. 57, Seagram R. 35). Sometimes, the distributor participates in three-cornered "deals" with the wholesaler and retailer (Calvert R. 55).

Prices to Louisiana consumers are fixed not by Louisiana retailers, nor by a Louisiana wholesaler, nor even by the distributor for Louisiana. Prices are fixed by the head office of the foreign distributor's foreign parent company (Seagram R. 49, Calvert R. 44). *Someone sitting in New York or Montreal fixes the prices to be charged by Schwegmann Bros. on St. Claude Street in New Orleans or by some little country store, say at Bayou Terre Aux Boeufs* (Seagram R. 38). Prices are uniform throughout the country, ex-

cept for freight and taxes (Calvert R. 49, Seagram R. 37). A uniform contract is used (Seagram R. 42). Even the notices sent to non-contracting retailers in Louisiana were prepared in New York and mailed from Florida (Calvert R. 75). The price-fixing—the very part of the scheme that offends the Sherman Act—takes place out of the state, is made effective by an interstate transaction (the complaints alleged that title to the wholesaler passes out of the state), and is an inseparable element of an integrated, uniform, nation-wide, price-fixing program involving interstate transactions and dependent for success upon activities affecting interstate commerce.[2]

Calvert Distillers Corporation, respondent, alleged that the fair trade price for a fifth of "Calvert Reserve" is $4.24; that Schwegmann Brothers sold it for $3.35 (Calvert R. 10). Seagram-Distillers Corporation, respondent, alleged that the fair trade price for a fifth of "Seagram's 7 Crown" is $4.24; that Schwegmann Brothers sold it for $3.51 (Seagram R. 10). Respondents filed suit in the United States District Court for the Eastern District of Louisiana to enjoin petitioners from selling Calvert and Seagram products

[2] See *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661 (1945); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 71 S. Ct. 259 (1951). The complaint states that respondent, Seagram Distillers Corp., the distributor, is specifically authorized by all of the producers in the Seagram network of corporations to enforce resale prices in Louisiana. The complaint alleges that "all such products purchased from plaintiff for resale in Louisiana are purchased from and sold by plaintiff in interstate commerce, shipments being made from and title passing at a point outside of the State of Louisiana." (Seagram R. 4.) Similar allegations are made in the Calvert complaint (Calvert R. 4). See also Paragraphs 3, 4, and 5 of Findings of Fact (Calvert R. 85, Seagram R. 81).

for less than the minimum prices fixed in fair trade contracts between respondents and certain Louisiana retailers.[3] The complaints were based on the non-signer clause (Section 2) of the Louisiana Fair Trade Act; respondents did not pretend to have any contractual relationship with petitioners, who were strangers to respondents' contracts. John Schwegmann, Jr., one of the petitioners, admitted the sales; testified that he had never signed any fair trade contract; stated that his policy was to buy cheaply, to operate economically, and to pass on savings to consumers (Calvert R. 67-68).

The District Court had no doubt as to the interstate character of the transactions involved (Calvert R. 48). The Court of Appeals was of the same opinion: ". . . the transactions, the subject of this suit, so affect interstate commerce and the exertion of the power of Congress over it as to *bring plaintiff's activities within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them*" (Calvert R. 104, Seagram R. 98).

The District Court granted injunctions in favor of respondents (Calvert R. 80, Seagram R. 77). Petitioners appealed[4] on the ground that the Miller-Tyd-

[3] For purposes of trial, the causes were consolidated and a stipulation entered that exhibits and testimony should be considered applicable in both causes, insofar as relevant. (Seagram R. 26, *et seq.*)

[4] The Court of Appeals consolidated the cases for briefing and argument (Calvert R. 96, Seagram R. 93) and rendered one opinion. The cases are separately docketed in this Court, but one petition was filed for writs of certiorari and one brief on the merits is filed.

ings Amendment excepts from the Sherman Act only contractual price-fixing; that non-contractual price-fixing imposed on strangers to a resale price maintenance contract is beyond the shelter of the Miller-Tydings Amendment.[5] The Court of Appeals, by a divided court, affirmed the District Court and, subsequently, refused a rehearing.

SUMMARY OF ARGUMENT

The Sherman Act prohibits price-fixing[6] in transactions affecting interstate commerce. The Miller-Tydings Amendment excepts "contracts or agreements

[5] In the District Court and in the Court of Appeals petitioners also contended that the so-called fair trade contracts in these cases are subject to potestative conditions, lack mutuality, and are invalid under Louisiana law.

[6] In this brief "resale price maintenance" is considered "price-fixing" and the terms are used interchangeably, where appropriate in the text. There has been considerable quibbling as to whether a fair trade act is a price-fixing statute; proponents of a price-fixing statute alluringly entitled "Fair Trade Act" are naturally sensitive to verbal connotations. In *Old Dearborn Dist. Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139 (1936) the Court ruled that "section [one] does not attempt to fix prices, nor does it delegate such power to private persons. It *permits* the designated private person to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit." This language is repeatedly encountered in the legislative history of the Miller-Tydings Amendment. (See footnote 7.) The Court, however, was here discussing Section 1, the contract clause. The Court's dictum has no application to the effect of the non-signer clause, under which the price for an entire retail level, binding all the retailers in a state, may be fixed by a single contract. Moreover, in more than a third of the states, fair trade laws actually permit setting definite rather than minimum resale prices. *"Price maintenance is mere price fixing."* Schachtman, *Resale Price Maintenance*, 11 Pittsburgh L. Rev. 562, 580 (1950). Petitioners submit that non-contractual resale price maintenance is price-fixing, but, whatever it is called, it has the effect of "fixing, pegging, or stabilizing the price of a commodity [and] . . . is illegal per se", unless immunized by the Miller-Tydings Amendment. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 71 S. Ct. 259 (1951).

prescribing minimum prices for the resale of a commodity". Petitioners submit that the Amendment provides no sanctuary for resale price maintenance imposed on those who are not parties to such contracts or agreements.

(1) The Miller-Tydings Amendment simply means what it says: contractual resale price maintenance is excepted from the Sherman Act; non-contractual resale price maintenance imposed on unwilling, non-contracting parties is not excepted. *Contractual* price-fixing no more includes *non-contractual* price-fixing than "navigable" includes "non-navigable" or "negotiable" includes "non-negotiable". Such verbal license may be fitting to Humpty Dumpty. It should not be imputed to the Congress of the United States legislating on a major national policy. Congress made its meaning demonstrably evident by paralleling the contract clause of a typical fair trade act. The Miller-Tydings Amendment is identical, word for word, with Section 1, the contract clause, of a typical fair trade statute, but bears no relation whatever to Section 2, the non-signer clause. (See p. 18.) The Amendment contains no language remotely resembling the language of the non-signer clause in a fair trade act and no reference anywhere to price-fixing imposed on non-signers. Congress did not purport to declare that all resale price maintenance was excepted from the antitrust laws. Far from that, Congress limited the scope of the exception to contracts, not all contracts fixing resale prices, but certain contracts complying with specific conditions.

(2) As a general rule of statutory interpretation, a exceptions or provisos are construed strictly. Ther is especial reason for a strict construction of th Miller-Tydings Amendment. The Amendment is a exception to the Sherman Act, the statute embodyin probably the most important statement of policy i the American philosophy of a democratic competitiv economy. The Amendment carves a gaping hole i the policy of free enterprise based on competition. law so inconsistent with national policy, a statut weighed in the balance by high authority and foun wanting, should be narrowly confined to its plai meaning.

(3) The Miller-Tydings Amendment is clear and un ambiguous. Under the plain meaning canon of statutor construction, there should be no resort to legislativ history to attempt to determine if the legislature in tended a meaning different from that plainly ex pressed. In this case, resort to legislative histor *creates*, it does not resolve, an ambiguity.

(4) The legislative history of the Miller-Tydings Amendment extends from the Sixty-Third through the Seventy-Fifth Terms of Congress. The Act derives from bills born of the *Dr. Miles* case at a time when the non-signer scheme was undreamt of in the price-fixer's philosophy. The language of the act is virtually identical with S. 100 and H. R. 1611, Seventy-Fifth Congress (1937); with S. 3822, 74th Congress (1936); with the Capper-Kelly bills (1925-1933). The substance of the act is the same as the Kelly bills (1917-1925), the Stephens bill (1916),

and the Stevens bill (1914). The Capper-Kelly bills (which supplied the language of the Miller-Tydings Amendment) and the earlier bills were introduced in Congress before there was any fair trade law, much less a non-signer clause. These legislative proposals were a direct reaction to *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 31 S. Ct. 376 (1911), holding resale price maintenance *contracts* illegal. The early bills and the Capper-Kelly bills and the later bills were *presented to Congress* as measures designed to write into the law the dissenting opinion of Justice Holmes in the *Dr. Miles* case; to legalize only a permissive resale price maintenance contract which a manufacturer and retailer could enter into "*if they want to do so*".[7] The Capper-Kelly bill, besides furnishing the form and substance of the Miller-Tydings Amendment, also supplied the language of the first fair trade law, the California Act of 1931, termed "The Junior Capper-Kelly Bill". It contained no non-signer clause. *At the state level*, to enforce resale price maintenance against non-contracting parties, California in 1933 had to amend its Fair Trade Law by the addition of a non-signer clause; all state fair trade laws follow the California model and contain an express and separate statutory provision making price-fixing applicable to non-signers. *But at the federal level*, no corresponding provision has ever been proposed in any congressional bill. The Miller-Tydings Amendment, because it is essentially

[7] Rep. McLaughlin of Nebraska, one of the principal proponents of the Miller-Tydings Act, and a member of the House sub-committee which submitted a report on H. R. 1611, (75th Cong., 1st Sess.) said: "H. R. 1611 . . . is entirely a *permissive* act. It merely *allows* the seller and buyer . . . to contract for resale of goods according to state law, *if they want to do so*." 81 Cong. Rec. 8141 (1937). *Cf.* Justice Sutherland in the *Old Dearborn* case, 299 U. S. 183, 57 S. Ct. 139 (1936).

the Capper-Kelly bill, exactly parallels the *contract* clause of a typical fair trade law and has no reference to non-signers. A fair appraisal of the entire legislative background of the Miller-Tydings Amendment impels the conclusion that the intent of Congress "goes no further than to remove the taint of illegality attendant upon such contracts as to interstate transactions *(Dr. Miles Medical Co. v. Park & Sons)* as is removed by Section 1 of the Louisiana Act now in question as to intrastate transactions".[8] Only within these narrow circumscribed limits is the Act "enabling legislation" for the states to experiment contrary to the national policy of free enterprise based on a competitive economy.

This case involves the price of a bottle of whiskey; the principle involved affects the price of food, drugs, clothing, and other necessities of life. This case resulted from the operation of an independent supermarket; the final decision will have a vital effect on the merchandising methods of thousands of independent merchants, who, by efficient management of a minimum-service business, or any other business, are able to reduce their costs and pass on corresponding savings to consumers. The decision will either stimulate or deter price-fixing by thousands of manufacturers and distributors. The decision will have an immediate and continuing effect on 140 million consumers in forty-five "fair trade" states who today are paying more for the goods they buy than they would pay for the goods in a free, competitive market. In nomal times this would be serious enough. In the present crisis, de-

[8] Dissenting opinion of Judge Russell (Calvert R. 110, Seagram R. 104).

tonated by the Korean war, perhaps the first of a long series of crises, Congress and everyone else is gravely concerned over the danger of inflation. The Miller-Tydings Act is inherently inflationary because private price-fixing under fair trade laws is inflationary.[9] The decision of the court below enlarges the scope of this dangerous exception to the Sherman Act.

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[9] Resale price maintenance is an "impediment to low-price policies." Nourse, *Price Making in a Democracy*, 161 (1944). In an article in the January issue of Fortune, 1949, *The Not-So-Fair-Trade Laws*, it was said: "[In a] study of 117 branded drug items . . . thirty-five cost about a third less in Washington than in Maryland, thirty-eight about a quarter less and twenty-nine about a seventh less". The former head of the Anti-Trust Division of the Department of Justice has stated: "So-called fair trading . . . has resulted in higher prices . . . . A bottle of Old Granddad costs $5.45 in Washington and $6.65 before state tax in Maryland." Bergson, *Current Problems in the Enforcement of the Anti-Trust Law*, Address to Bar Association of the City of New York; N. Y. Times, Feb. 18, 1949, p. 19, col. 1. "If the whole direction of resale price maintenance must be to favor the less efficient retailer and to block the use of standard techniques in aggressive and economical merchandising, then the end result must be that Fair Trade Laws raise prices on Fair Traded goods." Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24, 50 (1950). The Federal Trade Commission has pointed out that price increases "fell most heavily upon those consumers who from necessity or personal choice patronize minimum-service stores". *Federal Trade Commission Report on Resale Price Maintenance* (1945), XLVIII. "All the evidence available and *a priori* theorizing point indubitably to the conclusion that patrons of lower price, limited service firms are forced to pay higher prices for goods under control than previously . . . . [There was a general upward movement of prices and other factors to be considered, but] contractual prices in California in 1934 for [fair traded] products sold through drug stores were as much as 33-1/3 per cent higher than the advertised prices in newspapers during the first six months of 1933, at the bottom of the depression." Grether, *Price Control Under Fair Trade Legislation* (1939), p. 298. See also, Grether, *Experience in California with Fair Trade Legislation Restricting Price Control*, 24 Cal. L. Rev. 640 (1936). The author of a recent carefully considered article on the law and economics of resale price maintenance, concluded that the best way of determining whether the consumer gets more or less for his money under fair trade is to compare prices on identical items sold in a state under fair trade and in a state having no resale price maintenance law. He selected twenty-five items sold at drug stores in Illinois and Missouri. One-third were higher priced in the fair trade state of Illinois than the free trade state of Missouri. Not one was lower in price. On eight identical items the price was 15.6% higher in Illinois. "Under Fair Trade the consumer gets less for his money." Schachtman, *Resale Price Maintenance and Fair Trade Laws*, 11 Pitt. L. Rev. 562, 584 (1950).

ARGUMENT

I.

The Language of the Act: The Miller-Tydings Amendment Excepts from the Sherman Act only Resale Price Maintenance by Contract or Agreement; it does not Except Non-Contractual Resale Price Maintenance Imposed on Unwilling, Non-Contracting Parties.

In keeping with its importance as a statement of fundamental national policy, the Sherman Act is broad and very simply stated. Section 1 provides: "Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal."

In 1911 the Court decided, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, that resale price maintenance contracts were a violation of the Sherman Act. Mr. Justice Hughes, speaking for the Court, said:

> "The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purpose. . . . The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

After the *Dr. Miles* case and prior to the Miller-Tydings Amendment, it was settled that the Sherman

Act makes it unlawful to enter into any agreement, limiting or fixing the price at which a commodity must be resold. *U. S. v. Shrader's Sons, Inc.*, 252 U. S. 85, 40 S. Ct. 251 (1920); *U. S. v. Trenton Potteries Co.*, 273 U. S. 392, 47 S. Ct. 337 (1927). Except as provided in the Miller-Tydings Amendment, price maintenance contracts violate the Sherman Act *per se*. *Ethyl Gasoline Corp. v. U. S.*, 309 U. S. 436, 458, 60 S. Ct. 618, 626 (1940); *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811 (1940); *U. S. v. Univis Lens Co., Inc.*, 316 U. S. 241, 62 S. Ct. 1088 (1942); *U. S. v. Masonite Corp.*, 316 U. S. 265, 62 S. Ct. 1070 (1942); *U. S. v. Bausch & Lomb*, 321 U. S. 707, 721, 64 S. Ct. 805, 812 (1944).

Although state fair trade acts legalized resale price maintenance contracts involving *intrastate* transactions, the Sherman Act still prohibited resale price maintenance contracts involving interstate commerce. In the *Old Dearborn* case, which upheld the constitutionality of a state fair trade act, the Court took pains to point out that its opinion was restricted to the constitutionality of the Illinois Fair Trade Act. *The Court reiterated its position that "a [fair trade] agreement, nevertheless, constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-Trust Act." Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 195, 57 S. Ct. 139, 143 (1936).

It was this language and the continuing vitality of the *Dr. Miles* case that compelled the proponents of

resale price maintenance to renew their efforts to obtain federal immunity from antitrust prosecution.

The limited congressional immunity they succeeded in obtaining, after twenty-five years of unsuccessful lobbying,[10] was the Miller-Tydings Act, amending Section 1 of the Sherman Act. The Miller-Tydings Amendment provides that nothing "contained" [in the Sherman Act] shall render illegal "contracts or agreements prescribing prices for the resale of a commodity . . . when contracts or agreements of that description are lawful as applied to intrastate transactions."

This Court has pointed out that the immunity accorded price maintenance contracts is a limited immunity accorded an individual entering into a contract.[11]

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[10] The National Association of Retail Druggists was the pressure group principally responsible for the adoption of state fair trade acts and the Miller-Tydings Amendment. For an account of its lobbying activities see Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24, 54-57 (1949); FTC Report on Resale Price Maintenance (1945), 64-66, 142 *et seq;* TNEC Hearings, Part 8, 3368, 3461-3463 (1939). See also *The Fair Trade Controversy*, Fortune, 75 (April, 1949): "[After publication of the article *The Not-So-Fair-Trade* Laws in the January, 1949 Fortune] . . . our net impression was that unless we changed our attitude we would be subjected to those formidable pressures that N. A. R. D. knows so well how to exert . . . Do the members of the N. A. R. D. believe in an enterprise system or not? If they do not believe in it, then we can understand why they continue to defend, by argument, by pressure, and by personal aspersion, a system of laws that is at fundamental variance with its principles." *Counsel for the National Association of Retail Druggists proposes to file a brief as Amicus Curiae in this case.*

[11] "The Miller-Tydings Amendment to the Sherman Act does not permit combinations of business men to coerce others into making such contracts . . . It follows that whatever may be the rights of an individual producer under the Miller-Tydings Amendment to make price maintenance contracts or to refuse to sell his goods to those who will not make such contracts, a combination to compel price maintenance in commerce among the states violates the Sherman Act." *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661 (1945).

The best evidence of Congressional intent is what the Amendment says—the words of the act. "The plain meaning of the words of the act covers this [case]. No single argument has more weight in statutory interpretation than this." *Browder v. U. S.*, 312 U. S. 335, 338, 61 S. Ct. 595, 601 (1941). In *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215 (1944), the Court said:

> "We should of course be faithful to the meaning of a statute. But, after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another."

The Amendment says that it excepts resale price maintenance "contracts or agreements" from the Sherman Act. That is all it excepts. The statute is not couched in vague language or general words and the meaning of the words is not in dispute. In the absence therefore of any enlarging provision, there is no basis for asserting that the intent of the statute is also to except from the Sherman Act resale price maintenance imposed on unwilling, non-contracting parties. That is going beyond the bounds of the normal meaning of the words.

The limited scope of the Miller-Tydings Amendment, as manifested in the plain meaning of the words

of the Act, is conclusively proved by the close parallel between the Amendment and the contract clause of a typical fair trade act.

The Amendment is identical, word for word, with Section 1, the contract clause, of the Louisiana Fair Trade Act, a typical fair trade statute; it bears no relation whatever to Section 2, the non-signer clause. The Amendment contains no language remotely resembling the language of the non-signer clause and no reference anywhere to price-fixing imposed on non-signers.

The plain meaning of the Miller-Tydings Amendment is strikingly demonstrated by juxtaposing the Amendment with the Louisiana Fair Trade Act in parallel columns:

COMPARISON OF TYPICAL FAIR TRADE LAW AND MILLER-TYDINGS ACT

Louisiana Fair Trade Act.	Miller-Tydings Act.
(1) No contract relating to the sale or **resale of a commodity which bears, or the label or** content **of which bears, the trade mark, brand, or name of the producer or** owner **of such commodity, and which is in** fair **and open competition with commodities of the same general class produced by others** shall be deemed in violation of any law of the State of Louisiana . . .	Nothing contained in [the Sherman Act] shall render illegal contracts or agreements prescribing minimum prices for the **resale of a commodity which bears, or the label or** container **of which bears, the trade mark, brand, or name of the producer or** distributor **of such commodity, and which is in free and open competition with commodities of the same general class produced** or distributed **by others,** when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale . . .
(2) Willfully and knowingly, advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable . . .	

Note: Bold face indicates identity between statutes.

Some significance must be given to (1) the close correspondence between the Miller-Tydings Amendment and the contract clause of a fair trade act and (2)*the omission in the Amendment of any reference to non-signers.* It was no accident. If Section 2 of a fair trade act is necessary in order to enforce resale price maintenance against non-signers in intrastate transactions, equivalent federal legislative sanction also is necessary for interstate transactions.

The California Fair Trade Act of 1931, generally regarded as the first fair trade law, originally had no provision dealings with non-signers.[12] Section 1 of that statute, the contract clause, is similar to Section 1, the contract clause of the Louisiana law. In 1933, in order to reach non-contracting parties, California found it necessary to amend its law by adding the non-signer clause.[13] This amendment gave the California price-fixers the control they were seeking over non-contracting third parties. As the dissenting opinion of the court below so convincingly states:

> "Section 1 of the Louisiana Act relates, as likewise does the Federal Act, only to establishing the legality of the *contracts* in question. Thus far, the two statutes are in *pari materia*. Section 2 of the Louisiana statute, upon which the present cause is predicated, is a substantive law of Louisiana, not a contract or agreement. I believe it may not be successfully con-

[12] Cal. Stat. 1931, c. 278. In 1916 New Jersey enacted a statute called the "Notice Act", the nearest approach to a fair trade act before the California act. See Weigel, *The Fair Trade Acts* (1933).

[13] Cal. Stat. 1933, c. 260. The Amendment, Section 1½ of the California act, is identical with Section 2 of the Louisiana Fair Trade Law, except that the verbiage "at the suit of any person damaged thereby" follows the word "actionable".

tended that without Section 2, the provisions of Section 1 could be in any wise applied to retailers who had not seen fit to execute price maintenance contracts legalized by Section 1. *The terms of the Federal Amendment no more embrace Section 2 of the Louisiana Act than does Section 1 of that Act.*"

In terms, then, by the plain meaning of the words of the Act, the Miller-Tydings Amendment legalizes only resale price maintenance contracts. Whatever fine theory may be devised to rationalize price-fixing imposed by legislative fiat on non-signers [14]—such price-fixing is not contractual. There is no element of contracts present; there is no contractual relation whatever between the price-fixer and the non-signatory. Under the fair trade laws, one non-signatory may even bring suit against another non-signatory to enforce the terms of a fair trade contract, to which both are strangers. "Such a suit cannot be sustained on contract principles." Beaudette and Berens, "*The Non-Signer Clause of Fair Trade Acts: Constitutionality and Theory of Enforcement*", 25 Notre Dame Lawyer 529 (1950).

The obvious restriction of the Miller-Tydings Amendment to contractual resale price maintenance and the equally obvious non-contractual nature of resale price

[14] Theories of enforcement include: (1) prevention of tortious interference with contractual relations; (2) creation of an equitable servitude running with the chattel; (3) prevention of unfair competition; (4) protection of goodwill; (5) recognition of a statutory right. Beaudette and Berens, *The Non-Signer Clause of Fair Trade Acts: Constitutionality and Theory of Enforcement*, 25 Notre Dame Lawyer 529, 537 (1950).

maintenance imposed on non-signers in fair trade acts has not escaped attention of legal scholars:

> "The old resale price maintenance rested entirely on contract and the producer's power to refuse to sell to those who would not comply. The Fair Trade Acts pretend to be also based on contract. So the Supreme Court and Mr. Rogers point out that the Acts merely permit the parties to a sale to make a voluntary agreement as to resale prices if they so desire. But isn't that completely fanciful? A single contract between the manufacturer and a single retailer, if brought to the attention of the entire trade, is sufficient to bind the entire trade. . . . *Notice* of the fixed price, *not contract* is then the heart of the Fair Trade Acts. When the historical vestiges and the legal frills are pressed aside, the Acts provide for fixing resale prices by notice to prospective sellers. *This may be significant in a consideration of the Miller-Tydings amendment to the Sherman Act, providing that nothing therein 'shall render illegal, contracts or agreements* prescribing minimum prices'."
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> *Shulman, The Fair Trade Acts, 49 Yale L. Jour. 607, 618 (1940).*

In discussing the non-signer provision in a recent law review comment, the author writes:

> *"The Miller-Tydings Act merely echoes the first provision of the state acts and does not mention the non-signer section. This raises the issue of whether these sections [of state fair trade acts] are an attempted state regulation of interstate commerce.* Clearly, where the state forces non-contractors to observe prices established for fair-traded goods in inter-

state commerce, it is regulating that commerce. Although Congress may permit state regulation, without such permission the states cannot act. Passage of the federal statute with full knowledge of the state nonsigner provisions may indicate a legislative policy to grant such permission. . . . *It may be doubted, however, that state acts will finally be held applicable to interstate sales.*"

Boonstra, State Fair Trade Acts and Supplementary Federal Legislation, 47 Mich. L. Rev. 821, 826 (1949).

The dissenting opinion of the Court below makes the same point:

"Thus Congress has legalized the *contract* validated by State law, but not every provision of the statute. If, over and beyond the establishment of the legality of the contractual obligation to maintain minimum prices, the State statute otherwise authorizes conduct or procedure which runs afoul of a Congressional protection of interstate commerce from unlawful restraint such as the appellant defendant here asserts to be true as to him, such provision of the State statutes must yield to paramount Federal law."

As to interstate commerce, Congress has occupied the legislative field and has barred the door to inconsistent state legislation, except as expressly authorized by the

Miller-Tydings Act.[15] See also 2 CCH Trade Reg. Para. 7308 (1950).[16]

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[15] In *Hood & Sons v. DuMond*, 336 U. S. 525, 537, 69 S. Ct. 657, 662 (1949) the Court distinguished between the "power of the state to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage [a distinction] deeply rooted in both our history and our law" . . . "The State may not promote its own economic advantages by curtailment or burdening of interstate commerce." *Parker v. Brown*, 317 U. S. 341, 63 S. Ct. 307 (1943) is cited in the brief for the United States by *Amicus Curiae* in support of the petition for writs of certiorari and in the briefs of respondents opposing the petition. In that case the Court said: "A state may not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." The Court held, however, that a statute establishing a state program for marketing raisins was not in violation of the Sherman Act. The dictum quoted is applicable to this case; the holding is easily distinguishable. (1) In *Parker v. Brown* the state was the moving force in the combination. At every step of the proration program there was a statutory prescription of public hearings, careful supervision at all stages by state officers, and the program was under the control of a state Proration Program Committee and the California Director of Agriculture. It was, therefore, *state action, not action by private individuals.* Under a fair trade act, prices are fixed by private persons under a standardless statute unsupervised by the state. A state may be beyond the application of the Sherman Act; private individuals are not. Nor can private individuals plead that they acted under a state law; if every state law constituted state action, no state law would ever offend the Sherman Act. (2) The California proration program was not only a state program in which California participated as the moving force, it was a program in which the federal government actively joined. Under authority of the Agriculture Adjustment Act (48 Stat. 31), the Secretary of Agriculture executed a marketing agreement with the California raisin growers; the California Proration Committee borrowed funds from the Commodity Credit Corporation, which was guided by the Department of Agriculture. The Department of Agriculture administered the Agricultural Marketing Agreement Act and the surplus commodities program. For several years California worked closely with the Department of Agriculture, the Commodity Credit Corporation, and the Surplus Marketing Administration. Federal funds were advanced, federal agencies approved the state program, and, for a time, a federal Sales Policy Committee actually fixed prices. "Here we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy." A joint venture with the state and federal governments as active participants hardly describes the Calvert-Seagram price-fixing scheme.

[16] "*Contracting* dealers are bound to maintain prices in both intrastate and interstate transactions. Their liability in intrastate trans-

With the wish father to the thought, respondents, and advocates of price-fixing generally, would like to interpret the Miller-Tydings Amendment as broad enabling legislation for resale price maintenance. It cannot be so interpreted.

> "A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act."
>
> *United States v. Bausch & Lomb, 316 U. S. 265, 62 S. Ct. 1070 (1942).*

If Congress had wished to do so, it would have been simple to have relaxed the prohibitions of the Sherman Act by excepting all resale price maintenance under state fair trade acts. The Amendment does not broadly except resale price maintenance. "It is important to note that the Miller-Tydings Act does not legalize price fixing agreements generally nor even all resale price-maintenance contracts. . . . The Act does

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actions rests on both a contractual basis and the provisions of the applicable Fair Trade Act. *In interstate sales their liability rests solely on a contractual basis, as it seems . . . that the state statutory provisions against selling below established prices cannot apply to interstate commerce.* Non-contracting dealers, not being under a contractual liability, are forced to maintain established prices only if they are subject to state statutory prohibitions. It seems that interstate sales should not be held subject to the prohibitions of any state law. The Federal Act [The Miller-Tydings Act] does not expressly provide that *non-contracting* dealers are bound to observe minimum prices in interstate sales. It will be noted that the state acts contain in essence two provisions: (1) that resale price maintenance contracts are legal, and (2) that all persons, including non-contracting dealers, are prohibited from selling below stipulated prices. [The Miller-Tydings Act] merely echoes the first provision—that resale price maintenance contracts involving interstate sales are legal under the Federal laws if resale is to be in a state which permits such contracts. The Federal Act contains no wording similar to the second provisions of the state acts." 2 CCH Trade Reg. Serv., para. 7308 (1950).

not give the maker of trade-marked goods *carte blanche* to engage in price-fixing combinations even with respect to those goods. He is permitted to make only the specified kind of contract referred to in the Act, under the conditions which have been named."[17] The contracts must comply with the following specified conditions: (1) The contract must relate only to commodities sold under the trade-mark, brand or name of the manufacturer or distributor. (2) The commodities must be in open competition with similar products, sold by others. (3) The contracts must be authorized by the law of the state in which the resale is to be made. (4) Horizontal agreements between competitors, or between those on the same economic level, are specifically forbidden.

The last condition throws light on the applicability of the Amendment to non-signers. Horizontal agreements are prohibited under the Amendment. The effect, however, of interpreting the Miller-Tydings Amendment to include resale price maintenance against non-signers is to defeat the prohibition against horizontal agreements. Horizontal price-fixing affecting *all* retailers may be secured through the expedient of a single contract with *one* retailer. Two manufacturers or distributors are prohibited from conspiring to fix prices. They may accomplish their purpose by means of the non-signer clause; one manufacturer enters into a contract with a retailer for the sale of goods at the same price as the goods are sold by the other manufacturer. Is it a pure coincidence that the fair trade price for a fifth of Calvert Reserve is $4.24 and the fair trade price for a fifth of Seagram's 7 Crown is also $4.24?

[17] Loevinger, *The Law of Free Enterprise*, 108 (1949).

The Amendment then is not enabling legislation for all resale price maintenance. It is a special dispensation for price-fixing contracts: not for all price-fixing contracts, only for those which comply with certain conditions specified in the Act.

The language of the Miller-Tydings Amendment is plain and unambiguous: it excepts from the prohibitions of the Sherman Act contractual resale price maintenance and only such price-fixing. It says so in terms. It says so in echoing the contract clause of a typical fair trade act and in omitting any reference to the non-signer clause or to resale price maintenance against non-signers. There is nothing in the normal meaning of the words to justify drawing on some unexpressed spirit for a construction that permits resale price maintenance by "contract or agreement" to include non-contractual resale price maintenance. That is a liberty with words that might be acceptable in *Through the Looking Glass*—but not in the Sherman Act. Petitioners submit that "the decision below does violence to the plain meaning of the words of the Miller-Tydings Act." *Brief for the United States as Amicus Curiae in Support of the Petition for Writs of Certiorari.*

II

The Miller-Tydings Amendment should be Construed Strictly.

Law and common sense agree that in statutory construction an exception or proviso should be narrowly construed. "The legislative purpose set forth

in the general enactment expresses the legislative policy and only those subjects expressly exempted by the proviso should be freed from the operation of the statute." *Sutherland on Statutory Construction* (3d Ed. 1943), Section 4933.

This rule is applicable in any case involving the construction of an exception to a general statute, but it has particular force in the instant case.

The Sherman Act is more than most statutes. It is a great declaration of national policy. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. Federal Trade Commission*, 71 S. Ct. 240 (1951.) This Court has said:

> "It is not for us, however, to pick and choose between competing economic and business theories in applying [the Sherman] law. Congress has made the choice. It has declared that the rule of trade and commerce should be competition, not combination . . . Congress wanted to go to the utmost extent of its constitutional power . . . to make of ours, so far as Congress could under our dual system, a competitive business economy."
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> *U. S. v. Crescent Amusement Co., 323 U. S. 173, 187, 65 S. Ct. 254, 89 L. Ed. 160 (1944).*

The Sherman Act officially commits this country to the philosophy of free enterprise based on a competitive economy—perhaps the distinguishing characteristic of the American politico-economic system. Historically, the principle antedates the Sherman

Act; it is one of the oldest in American law, and is one that has had the long-standing approval of the American people. In terms of individual political freedom its importance cannot be overstated. "The freedom of man under capitalism is an effect of competition."[18]

Of all the enactments by Congress, the Sherman Act is probably the most general in its application. Indeed the Court has pointed out that "as a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. U. S.*, 288 U. S. 344, 359, 53 S. Ct. 471, 474 (1932).

The Court, therefore, construes the Sherman Act broadly and will not deviate from a broad construction of the Act even if it could be argued that a particular antitrust violation has a desirable purpose. It will not weigh the end, if the means are reprobated. These considerations have a unique validity in cases involving price-fixing: there is no rule of reason when private individuals combine to fix prices. Thus, in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 S.

[18] A distinguished modern Austrian economist describing the relation between competition and freedom in a democracy writes: "No government and no civil law can guarantee and bring about freedom otherwise than by supporting and defending the fundamental institutions of the market economy . . . Where there is no market economy, the best intentioned provisions of constitutions and laws remain a dead letter. *The freedom of man under capitalism is an effect of competition* . . . The consumer is not at the mercy of the shop-keeper." Von Mises, *Human Action, A Treatise on Economics* 283 (1949).

Ct. 811 (1940), the Court said:

> "For over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense . . . If the so called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be *the charter of freedom which its framers intended.*"

In construing the law in this case, petitioners do not ask the Court to pass on the wisdom of the law. Petitioners suggest, however, that in determining whether the Miller-Tydings Amendment should be construed narrowly or broadly, it is appropriate to consider the relation of the Amendment to the national policy of a competitive business economy as set forth in the great "charter of freedom" that is the Sherman Act. This requires some economic evaluation of the Amendment and resale price maintenance.

The subject is highly controversial—among retail druggists and liquor dealers, but is hardly controversial at all among nonpartisan economists or among legal scholars who have analyzed the problem in the light of what has taken place since price-

fixing was first foistered on the public under the beguiling misnomer "fair trade".

The Miller-Tydings Act was smuggled into the law in the closing days of the legislative session of the Seventh-Fifth Congresss as a rider to a District of Columbia Appropriation Act, after Congress had failed to act on similar bills previously introduced, reported, and debated. When the bill reached the President's desk for signature, a veto of the bill would have handicapped the operation of the City of Washington. The President had consistently opposed such legislation and when he signed the bill, he expressed the hope that the act "will not be as harmful as most people predict".[19] The Federal Trade Commission[20] and the Department of Justice[21] opposed its

[19] N. Y. Times, Aug. 19, 1937, p. 26, col. 1.

[20] "Minimum resale price maintenance was originally advocated by manufacturers of highly individualized, trade-named or branded products as a means of protecting them from unrestrained price cutting among dealers to whom the products were sold outright. When finally enacted by the states and by the Congress, however, its enactment was urged almost entirely by a few well organized dealer groups as a means of eliminating price competition both of dealers using the same methods of distribution and of dealers using new and different methods of distribution . . . The conclusion of the Department of Justice is that the actual effects of resale price maintenance have been those which are to be expected from private price fixing conspiracies, unregulated by public authority . . . The essence of resale price maintenance is control of price competition . . . to the detriment of consumers . . . The Commission believes that the consumer is not only entitled to competition between rival products but to competition between dealers handling the same branded product." *FTC Report on Resale Price Maintenance* (1945), p. LIV, LIX, LXIV. In an earlier report the Federal Trade Commission also disapproved of resale price maintenance. See FTC Report on Resale Price Maintenance (1931) Part II, 165.

[21] "The Department [of Justice] recommends the repeal of the Miller-Tydings Amendment . . . Already the record shows that it does not serve the purposes which were urged upon Congress as a reason for its passage, that it sanctions arrangements inconsistent with the purpose of the antitrust laws, and that it becomes a cloak for many conspiracies in restraint of trade which go far beyond the limits established in the amendment." *FTC Report on Resale Maintenance* (1945) LXIII. See also testimony of Herbert A. Bergson, Asst. Attorney General, before the Subcommittee of the House Judiciary Committee, July 27, 1949.

enactment. The Act has been condemned by the Temporary National Economic Committee,[22] the President's Council of Economic Advisors,[23] and by virtually all economists and legal writers who have written on the subject. In a recent carefully considered article, the author states:

> "The technique used to secure the passage of the Miller-Tydings Act repudiates the thesis that we need not regard this Act as any intentional modification of our traditions. The Act is an aberration, fostered and propelled by a minority pressure group. It will die because of the weakness of its internal structure; but for the good of the body politic and economic, it should be killed, swiftly and definitely."
>
> *Rose, Resale Price Maintenance, 3 Vanderbilt L. Rev. 24, 54 (1949).*

A large volume of water has flowed over the dam since the *Dr. Miles Medical* case, 220 U. S. 373, 31 S. Ct. 376 (1911) [24] and since the *Old Dearborn Dist.*

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[22] The Temporary National Economic Committee approved the following recommendation: "The Miller-Tydings Enabling Act, which legalizes resale price maintenance contracts in interestate commerce, results in some of those economic and social practices to be expected from private price-fixing conspiracies. The legal sanction of such practices tends to undermine the basic tenets of a competitive economy and introduces rigidities into the pricing of certain goods which restrain trade. Consequently, we recommend to the Congress the repeal of the Miller-Tydings Enabling Act." *Federal Trade Commission Report on Resale Price Maintenance*, (1945), LXIII. See TNEC Final Report (1941).

[23] Third Annual Report to the President by Council of Economic Advisors.

[24] When Mr. Justice Holmes wrote his dissent in the *Dr. Miles Medical* case, 220 U. S. 373, 31 S. Ct. 376 (1911) and when Mr. Justice Brandeis wrote *"Cutthroat Prices—The Competition that Kills"*, Harper's Weekly, Nov. 15, 1913, neither envisaged a non-signer clause. Mr. Justice Brandeis and other sincere advocates wished to protect the manufacturer's property right in goodwill and to prevent predatory price-cutting. Of course, the economics of

Co. v. Seagram Distillers, 229 U. S. 183, 57 S. Ct. 139 (1936). In retrospect, it has been said that Mr. Justice Sutherland's opinion in the *Old Dearborn* case seems like "reminiscing about resale price maintenance when it was young, fresh, and fair".[25] Since then, the fair trade acts designed to protect the property interest of the manufacturer in the trade-mark or brand name have turned out "to be a blackjack in

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merchandising do not support the thesis that only "knaves" cut prices. "Price cutting based upon superior efficiency is essential to the ideal of our economic system." McLaughlin, *Fair Trade Acts*, 86 Pa. L. Rev. 803, 812 (1938). One student of resale price maintenance has written: "At the beginning of this Fair Trade movement there were men who advanced arguments in which they sincerely believed [Mr. Justice Brandeis, for example] . . . . There is ample reason to doubt this sincerity to-day . . . . What was once a sincere defense of a property right has become the pretext for bludgeoning of one economic group for the benefit of another." Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24, 37 (1950).

[25] Shulman, *The Fair Trade Acts*, 49 Yale L. Jour. 607, 615 (1940). Justice Sutherland's opinion has been characterized as "to a considerable degree divorced from the economic realities." Note, *Compulsory Resale Price Maintenance in Liquor*, 57 Yale L. J. 459, 470 (1948). Decisions of some of the lower courts were closer to the economic realities. Judge Samuel I. Rosenman, when a member of the New York Supreme Court, in an opinion that has been widely quoted, holding the New York Fair Trade Law unconstitutional, said: "The law applies to all retailers, irrespective of their motive or intent in selling their own property at lower prices. Without regard to the effect upon competitors, the retailer by this statute is compelled to charge his customers a higher price than might afford him a reasonable profit . . . . Even though a retailer charges a fair price for his commodity involving a fair profit to himself, he may still be enjoined or mulcted in damages merely because the price he charges is not as exorbitant as the producer desires it to be . . . . An analysis of this statute discloses several startling features so arbitrary and discriminatory in effect that the statute cannot be sustained . . . in so far as it applies to retailers who have not signed price maintenance agreements . . . . It is left to private individuals, producers, to determine, first, whether prices should be fixed, and, second, at what level. No outsider, who may be ultimately bound by the determination, is permitted an opportunity to be heard on either question. The retailer, who is going to be restricted in the conduct of his own business by the conclusions reached, is not allowed to present his views as to the reasonableness of the price, or indeed, as to the necessity for fixing any price. The consumer, who must bear the burden of the increased price, has no opportunity to be heard before the prices are fixed." *Coty, Inc. v. Hearn Department Stores*, 158 Misc. 516, 284 N. Y. S. 909 (1935).

the hands of the retailers". DeGanahl, *Trade Practices and Price Controls in the Alcohol Beverage Industry*, 7 Duke Law and Contemporary Problems 664 (1940.) "[The Fair Trade Acts] permit elimination of price competition in the distribution of goods even when differences in price reflect only differences in efficiency. They permit competition between producers, between commodities, but restrain competition between distributors, between different methods of distribution. They permit the fixing of prices in what may be the worst way—not by a public body, not in accordance with even vague, prescribed standards, not for named commodities or classes of goods, but by the unilateral action of any private trade-mark owner for any goods marketed under his trade-mark." Shulman, *The Fair Trade Acts*, 49 Yale L. Jour. 607, 619 (1940.) "Irrespective of the constitutional issues, economic issues in abundance are arrayed against compulsory resale price maintenance . . . Consumers are either priced out of the market or are forced to pay a higher price than is necessary; the waste of resources represented by an excessive number of outlets is encouraged." Note, *Compulsory Resale Price Maintenance in Liquor*, 57 Yale L. Jour. 459, 470-471 (1948.) "The business man [ought] to be encouraged to attract trade by economies of operation and by passing on his economies to the consumer . . . Any scheme which would effectually prevent the cash-and-carry consumer from buying at a cheaper price than the consumer who gets elaborate delivery and other service plus costly credit is a *vicious* scheme. Any program which endeavors to restrain price com-

petition based upon efficiency requires a showing of exceptional circumstances to warrant a hearing." McLaughlin, *Fair Trade Acts*, 86 Pa. L. Rev. 803 (1938).

Analyzing the economic effects of fair trade acts on manufacturer, retailer, and consumer, one writer concludes: "Fair Trade Acts and resale price maintenance protect a selfish pressure group at the expense of the public. The Fair Trade Acts eliminate price competition in the distribution of goods, even when differences in price reflect only differences in efficiency. They restrain competition between distributors. They permit the fixing of prices by any private trade-mark owner for any goods marketed under his trade-mark. Many times the owners is forced into setting a price. No public body intervenes nor are there any prescribed standards. *These are, without a doubt, in conflict with all the principles of a free competitive economy.* Once more a re-examination of the entire issue of resale price maintenance and the Fair Trade Acts is urged. It may be that there are evils to be corrected, but on the basis of experience let us get at those evils without undermining all that free competition stands for.[26]

[26] Use of "loss leaders" is one of the alleged evils most inveighed against in the early literature of resale price maintenance. This was the predatory price-cutting Brandeis feared. Brandeis, *Business—a Profession* (1914). Actually, however, both the extent and the use of loss leaders and the harm they cause are largely speculative; the term amounts to little more than an epithet. Nelson, *Trade Practice Conference Rules and the Consumer*, 8 Geo. Wash. L. Rev. 452, 460 (1940). There is not much said about loss leaders now, thanks largely to statutes in thirty-one states, including Louisiana, which deal with this problem by prohibiting sales below cost. Cost is defined variously; in Louisiana as invoice cost or replacement cost, less discounts, plus freight and a

Fair trade laws are not the answer." Schachtman, *Resale Price Maintenance*, 11 Pitt. L. Rev. 562, 590 (1950). In a comprehensive study of free enterprise, the author summarizes his conclusions as follows:

> "These [fair trade laws] are completely inconsistent with the philosophy of free enterprise and with the pattern of our other legislation. They disregard the interest of the consumer in price competition, protect a particular class of producers, and favor the inefficient, high-cost distributor rather than the efficient seller . . . The fair trade laws seem to be an unjustified infringement of the entrepreneur's and the consumer's economic liberty."

Loevinger, Law of Free Enterprise, (1949), p. 283.

Published material on resale price maintenance is extensive. Many other quotations might be added. Counsel wish particularly to call to the attention of the Court two recent and very able studies on the subject, both previously cited. Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24 (1949) and Schachtman, *Resale Price Maintenance and the Fair Trade Laws*, 11 Pitt. L. Rev. 562 (1950).

6% mark-up. La. Act 338 of 1940; R. S. 51:421-427. Such laws prevent invidious price wars. These statutes have been severely criticized. See Lovell, *Sales Below Cost Prohibitions*, 57 Yale L. Jour. 391 (1948). At least, however, such laws are aimed at *predatory* price reductions; they attempt to differentiate between good and bad price-cutting. "The Fair Trade Acts do not do this. Resale price maintenance stifles good competition which is absolutely essential to our competitive system." Schachtman, *Resale Price Maintenance*, 11 Pitt. L. Rev. 563, 589 (1950). "If 'predatory' loss selling is in truth the major threat that the adherents of 'fair' trade claim, it would certainly be preferable to devise laws directed at this *specific* evil than to strike, as at present, at all price competition, good and bad." *The Fair Trade Controversy, Fortune*, 75 (April, 1949).

The conclusions of the Department of Justice, the Federal Trade Commission, the Temporary National Economic Committee, the President's Council of Economic Advisers, and numerous economists and legal scholars demonstrate that, whatever may have been the original purpose of the Miller-Tydings Amendment, or the motives of its proponents—experience has shown that the Amendment is completely inconsistent with the philosophy of free enterprise in a competitive economy as set forth in the Sherman Act. Petitioners submit therefore that the scope of the Amendment should be narrowly confined to the literal meaning of the Act.

"The general policy of the antitrust laws is a broad one; the [Miller-Tydings] exception is narrow and will be strictly construed. To gain the benefit of the exception, one must comply strictly with all its terms." Loevinger, *The Law of Free Enterprise*, p. 108 (1949). The cases which have been before the Court involving the Miller-Tydings Amendment show that the Court has followed this course of construing the provision strictly. *U. S. v. Univis Lens Co.*, 316 U. S. 241, 62 S. Ct. 1088 (1942); *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 64 S. Ct. 805 (1944); *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661 (1945). *Cf. Kiefer-Stewart Co. v. Joseph Seagram & Sons*, 71 S. Ct. 259 (1951).

"A literal reading of the [Miller-Tydings] amendment would seem to indicate that the scope of the enactment is limited to legalizing only 'contracts or

agreements' in interstate commerce";[27] it does not extend immunity to price-fixing *quoad* strangers to these contracts.

III

The Court should not go into the Legislative History in this Case. Here, Resort to Legislative History Creates, It Does Not Resolve, Ambiguities.

It is one thing to examine legislative history to resolve an ambiguity. It is another thing to go into legislative history to *create* an ambiguity. The Miller-Tydings Amendment is plain and unambiguous. On its face it legalizes price-fixing *by contract*, but not price-fixing beyond contract. Not unless one dredges through congressional debates and reports can any evidence be dug up of an intention (on the part of some legislators) to give immunity to non-contractual price fixing. And this intention is rebutted by contrary evidence in the legislative background. Petitioners submit that the Court should not resort to legislative history to ascertain what the legislature intended, when the language is clear.

The instant case should be governed by the principle as stated by Mr. Justice Jackson, quoting Mr. Justice Holmes:

> "We do not inquire what the legislature meant, we ask only what the statute means." [28]

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[27] Green, *Resale Price Maintenance*, 25 Wash. L. Rev. 265, 271 (1950).
[28] Jackson, *The Meaning of Statutes: What Congress or What the Court Says*, A. B. A. Jour. 535 (1948).

This issue goes to the nature of law. Society must base its actions on objective standards; on the common acceptance of words as written in a statute.[29] "The words employed are taken as a final expression of the meaning intended." *United States v. Missouri Pacific Ry.*, 278 U. S. 269, 49 S. Ct 133 (1929).

As a matter of statutory construction, the rule is well settled that where the meaning of a statute is plain, the court should not alter its meaning by conclusions deduced from legislative history of the statute. Sutherland states the rule: "The most common rule of statutory interpretation is the rule that a statute clear and unambiguous on its face need not and cannot be interpreted by a court and only those statutes which are ambiguous and of doubtful meaning are subject to the processes of statutory interpretation." *Sutherland on Statutory Construction* (3d Ed. 1943), Sec. 4502. See also Sec. 4702.

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[29] Wurzel, in a monograph entitled *Das Juristiche Derken*, published in translation in *Modern Legal Philosophy Series: Science of Legal Method*, p. 353 (1917), gives two quotations from foreign jurists that are apt here: "Thus Hahn has said: 'Law is not what the legislator intends, but what he has solemnly, by his statute, declared to be that which he intends' . . . Janka asserts . . . 'interpretation has to deal with the statute, with the legislative expression, and not with the legislative intention that may lie behind the expressed declaration. If the legislator has intended to express something different from what he has expressed, or if he has intended to express something he did not express, yet, even if the divergence were conclusively proved by extraneous evidence, that which has been expressed is in effect in the form in which it is expressed." Coming closer to home, Horack, editor of the latest edition of Sutherland on *Statutory Construction*, observes that "even though words have no intrinsic meaning it is fair to impose reasonable uniformity in the use of symbols or otherwise the art of communication must surely fail" and "one who uses them differently must disclose the difference or be bound by the common parlance of the society in which the words are used." Horack, *Disintegration of Statutory Construction*, 24 Ind. L. Jour. 335, 337 (1949).

In an early case the Court said:

> "The spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation. Where words conflict with each other, where the different clauses of the instrument bear upon each other and would be inconsistent unless the nature and common import of the word be validated, interpretation becomes necessary; and to depart from the obvious meaning of words is justifiable. Yet, in most cases, *the plain meaning* of a provision not contradicted by any other provision in the same instrument, *is not to be disregarded because we believe the framers of the instrument could not intend what they say. It must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application.*"
>
> *Sturges v. Crowingshield, 4 Wheat. (17 U. S.) 122, 4 L. Ed. 529 (1819).*

Nearly a century later, the Court had not changed its position:

> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."
>
> *Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192 (1916).*

> ". . . extrinsic aids to construction [may be used] *to resolve but not to create ambiguity.*" *U. S. v. Shreveport Grain & Elevator Co., 287 U. S. 77, 83, 53 S. Ct. 42 (1932).*

The plain meaning canon raises a preliminary issue of the propriety of resorting to legislative history. That preliminary issue here is whether the phrase "contracts or agreements" is ambiguous. Only if the Court should agree with respondents' contention that the phrase is ambiguous, should resort he had to legislative history. "The frequently quoted formula that extrinsic aids may be restored to 'to resolve but not to create ambiguity' can only mean that the evidence provided by such aids should be considered solely for the light which it throws upon the proper resolution of a doubt or 'ambiguity' apparent to the court *before* it examines the extrinsic sources. In other words, the theory of the plain meaning doctrine is that the 'ambiguity' or 'absurdity' which will take the case outside the scope of its application must be discoverable upon a bare or literal reading of the text, wholly apart from the background or context which the committee reports and other extrinsic sources provide."[30]

The Court has, in several instances, upheld the literal meaning of a statute *even where the legisla-*

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[30] Jones, The Plain Meaning Rule, 25 Wash. U. L. Q. 2, 11 (1939). The author also states: "The evidence afforded by extrinsic aids, logically speaking should be irrelevant unless the interpreting court has first come to the conclusion either that the statute is 'ambiguous' with respect to the fact situation of the particular controversy, or that the application of the statute, according to its literal meaning, would lead to 'absurd or wholly impracticable consequences'."

tive history conclusively demonstrated that the literal meaning did violence to the legislative intention.

In *Caminetti v. U. S.*, 242 U. S. 470, 37 S. Ct. 192 (1916) the Court was called upon to decide whether the Mann Act, which makes it a federal offense to aid in the transportation of a woman across a state line "for the purpose of prostitution or debauchery or any other immoral purpose," applied to a man who transported his mistress across a state boundary. There was no question of "white slavery". The legislative history showed beyond any doubt that the author of the law and the Congressional Committees considered the Act inapplicable to such cases, because the law was aimed at commercialized vice and the white slave trade. Mann, as author of the bill and as Committee Chairman, had stated unequivocally that the Act would be inapplicable to a case such as the one before the Court. Nevertheless, the Court held the language plain and unambiguous. Under the plain meaning rule, and a holding that the phrase "or other immoral purpose" included conduct such as in the case before the Court, the Court refused to go into the Congressional intent.

Another striking illustration occurred in the field of liquor regulation. Section 2 of the Twenty-First Amendment prohibits the "transportation or importation into any state . . . of intoxicating liquors, in violation thereof." In *State Board of Liquidation v. Young's Market Co.*, 299 U. S. 59, 57 S. Ct. 77 (1936) the plaintiff demonstrated from legislative history

that a literal reading of Section 2 did violence to the intention of Congress, that Section 2 of the Twenty-First Amendment was intended to apply only to the laws of dry states, and that the states could pass laws burdening commerce, only if the laws related to public health, safety, or morals. The Court met this argument with the plain meaning rule:

> "The plaintiffs argue that limitation of the broad language of the Twenty-First Amendment is sanctioned by its history; and by decisions of this court on the Wilson Act, the Webb-Kenyon Act [the language of the amendment tracked the Webb-Kenyon Act, as was pointed out in the congressional debates], and the Reed Amendment. *As we think the language of the Amendment is clear, we do not discuss these matters.*"

The Court recently has reasserted this principle in the following language:

> "Petitioners' chief argument proceeds not from one side or the other of the literal boundaries of Section 1404(a) [of the Judicial Code], but from the legislative history. *The short answer is that there is no need to refer to the legislative history where the statutory language is clear . . .* This canon of construction has received consistent adherence in our decisions."
>
> *Ex Parte Collette, 337 U. S. 55, 61, 69 S. Ct. 944, 947 (1949).*

See also *Gemsco v. Walling*, 324 U. S. 244, 260, 65 S. Ct. 605, 614-615 (1945), and *Packard Motor Car Co. v. N. L. R. B.*, 330 U. S. 485, 492, 67 S. Ct. 789, 793 (1947).

Resort to legislative history is a last resort. It is becoming more and more divorced from reality.[31] There are 96 senators and 435 congressmen in the Congress of the United States. What may have been in the minds of these 531 individuals when they enacted any statute is impossible to divine. When a statute is controversial and there is a multiplicity of reports and a welter of debate, extending over many sessions, collective legislative intent becomes a pure fiction. The legislative intent of 531 legislators is best evidenced by the language they enact into law and not by a dredging operation that may dig up pronouncements by one or two legislative friends of the lobby that pressured for or against a particular bill.

Petitioners are confident that consideration of the entire legislative background of the Miller-Tydings Amendment will prove beyond a doubt that it was intended as a very limited exception for permissive resale price maintenance contracts only. But it should be unnecessary to go into this legislative history. The language of the Amendment speaks for itself.

Discussion of Opinion Below in Relation to Clear and Unambiguous Holding of Court: Error of Majority of Court Below.

Counsel for petitioners confess an inability to understand the reasoning in the majority opinion of

[31] "The least reflection makes it clear that . . . a legislature . . . has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs." Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 869 (1930).

the court below. With all due deference, counsel believe that the majority of the court fell into a two-fold error: (1) a misuse of the term "contracts" and, as a result, (2) a misconception of the issue.

The majority and minority opinions agree the Miller-Tydings Amendment is so clear and unambiguous that there should be no resort to legislative history. At first blush one might conclude that this agreement between the majority and minority of the court below is irreconcilable with their diverging conclusions, and that the Miller-Tydings Amendment necessarily must be ambiguous. This does not necessarily follow. Counsel do not wish to ascend into the rarefied atmosphere of semantics, but submit that the fact that a term means different things to different persons does not necessarily prove the term ambiguous. One of the two persons may have erred in his understanding of the meaning of the word or in his application of the word to a factual situation. Suppose that a court were called on to construe a statute covering "negotiable instruments" and to apply the statute to a case involving a promissory note payable to a named payee rather than to the order of the payee. If, by some strained process, difficult to understand, a majority of the court concluded that the note were within the purview of the statute—such a conclusion would not prove that the term "negotiable instruments" has uncertainty of meaning. There is a rule of reason in determining whether a word or phrase is ambiguous. Counsel submit that "contracts or agreements" is no more doubtful than "negotiable instruments." "Negotiable" would not

refer to a "non-negotiable" note. Resale price maintenance by contract should not include resale price maintenance *not* by contract. The term "contracts or agreements" apparently was perfectly clear to the majority of the court below, but, for some reason which defies counsel's understanding, the majority of the court below applied the term to a situation where there was no element of contracts involved.

The misapplication of the term led the majority of the court below to a misconception of the issue. The majority regarded "the main battleground [to be] . . . whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act the price maintenance contracts relied on in this case". This is not the issue. There is no dispute as to whether the Amendment is effective to relieve from the prohibitions of the Sherman Act these price maintenance contracts. Rather, the issue is the applicability of the Amendment to price-fixing over and beyond these contracts, that is, the enforceability of resale price maintenance against non-contracting parties. The majority opinion states that "the proponents of . . . the fullest scope for state fair trade statutes needed only the passage of a federal act relieving . . . contracts . . . from the [Sherman Act]." Counsel contend that this begs the question since it rests on the a *priori* assumption that "contracts" include, what, for lack of a better term, might be called non-contracts.

In accordance with its conception of the issue, the majority of the court below made much of the inher-

ent power of the states to enact fair trade laws: "[It was not necessary] to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power . . . . In insisting, therefore, that the Miller-Tydings Amendment is ineffective . . . as to non-signers because it . . . does not in terms grant to the states power to make such laws effective against non-signers of such contracts, appellants wholly misconceive the issue." The majority opinion further states that lifting of Sherman Act prohibitions of resale price maintenance contracts "removed every prohibition from, or impediment in the way of, the enactment by states of fair trade laws, binding alike on signers and non-signers."

The fallacy in the majority opinion lies in treating the problem as one of authority of the states to *enact* fair trade laws. Actually, the problem is the *enforceability* of resale price maintenance, valid under state law, against a non-contracting party in an *interstate* transaction. In this case petitioners do not question a state's power to enact a fair trade law, *regulating intrastate transactions*, against signers and non-signers. But a state's authority is limited by the commerce clause of the United States Constitution, the Sherman Act, and other federal statutes in the field of interstate commerce. (See pages 22 and 23 of this brief and footnotes 15 and 16.) Counsel believe that the correct view is expressed in the minority opinion:

> "Congress has legalized the *contract* validated by the State law, but not every provision of the

statute. If, over and beyond the establishment of the legality of the contractual obligation to maintain minimum prices, the State statute otherwise authorizes conduct or procedure which runs afoul of a Congressional protection of interstate commerce from unlawful restraint, such as the appellant defendant here asserts to be true as to him; such provision of the State statutes must yield to paramount Federal law."

IV.

The Legislative Background of the Miller-Tydings Amendment shows this Exception to the Sherman Act was Intended to Apply only to Resale Price Maintenance by Permissive Contracts or Agreements; that is, to Voluntary Resale Price Maintenance Only Between Contracting Parties.

The legislative history of the Miller-Tydings Act is long,[32] but the pattern becomes clear if one can both see it as a whole and recognize the close relation of its parts. The Amendment is the last of a series of interlocking bills that began as a reaction to *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 31 S. Ct. 376 (1911). The components of the series, from the Stevens bill of 1914 through the Capper-Kelly bills to the Miller-Tydings Act, do not vary in substance and show little variance in language. Form and substance were originated prior to the existence of a non-signer clause, or even of a fair trade law. From first to last, the bills were designed only to erase the

[32] The legislative background is considered at length in Appendix E, p. 66.

taint of illegality attached to voluntary resale price maintenance between contracting parties—the type of price-fixing condemned in the *Dr. Miles* case.

In the *Dr. Miles* case, Justice Holmes wrote a vigorrous dissent in which he urged the validity of resale price maintenance contracts. He said:

> "[There is a contract between Dr. Miles Medical Co. and] the retail agents . . . fixing the price below which they will not sell to the public. *There is no attempt to attach a contract or condition to the goods* . . . or in any way to restrict dealings with them after they leave the hands of the [contracting] retailmen. The sale to the retailers is made by the plaintiff, and the only question is whether the law forbids *a purchaser to contract with his vendor* that he will not sell below a certain price . . ."[33]

This decision aroused considerable interest. In 1913 a group of *manufacturers* formed the Fair Trade League to force legislative action. Within a year, the Stevens bill was introduced in the Sixty-Third Congress to legalize contracts between manufacturers and retailers fixing resale prices.[34] Failure of enactment of this bill brought forth the Stephens bill in 1916. Next came the Kelly bills, introduced in the Sixty-Fifth, Sixty-Sixth, Sixty-Seventh, Sixty-Eighth, and Sixty-Ninth Congresses (1917-1925). Then, the important Capper-Kelly bills were introduced in the

[33] *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 410-411, 31 S. Ct. 376 (1911).

[34] It is said that Justice Brandeis was the author of the bill. See Mason, *Brandeis, A Free Man's Life* (1946), p. 502.

Seventieth, Seventy-First, Seventy-Second, and Seventy-Third Congresses (1927-1933).[35]

Each of these bills was presented to Congress as a legislative endeavor to avoid the *Dr. Miles* case. Representative Kelly stated that: "Up to that time [1911] any independent manufacturer could make an agreement with his distributor as to resale prices but that right was taken away by a decision of the Supreme Court in the Doctor Miles case", and that the bill was designed "to restore a right which was universally held up until [the *Dr. Miles* decision]."[36] The co-author of the bills, Senator Capper, referred to the measure as being designed to write into law the minority opinion of Justice Holmes in the *Dr. Miles* case.[37] This purpose was reiterated in the debate in both Houses of the Congress.[38]

From 1933 to 1935, there was an hiatus. In this period no resale price maintenance bills were introduced because many of the retail codes adopted under the National Industrial Recovery Act fixed prices, authorized minimum mark-ups, and generally permitted resale price maintenance.

Meantime, discouraged by the attitude of Congress, advocates of resale price maintenance had turned their attention to the states. In 1931, California

[35] See Appendix E for a more detailed account of this early legislation and for references to the bill numbers.
[36] 74 Cong. Rec. 361.
[37] 75 Cong. Rec. 14989.
[38] 72 Cong. Rec. 9517; 74 Cong. Rec. 361, 2398, 3485, 3527; 75 Cong. Rec. 14989; 76 Cong. Rec. 482, 3596.

adopted the first fair trade act,[39] using as a model the version of the Capper-Kelly bill introduced in the Seventy-First Congress, which did not contain a non-signer clause.[40] The language of the two is virtually identical,[41] and the California Act of 1931 was called the "Junior Capper-Kelly bill." [42]

Thus far no one had considered construing a bill or statute legalizing resale price maintenance contracts as applicable to non-contractual price-fixing. In 1933 the non-signer scheme was devised, in order to reach non-contracting retailers. In that year the California Fair Trade Act was amended, by the addition of the non-signer clause (Section 1½).[43] This amended California Act furnished the basis for subsequent state fair trade acts, including the Louisiana Act.

It should be noted that the provisions of the Louisiana Fair Trade Act, like the provisions of the California Fair Trade Act, are virtually identical with the Capper-Kelly bill, *except for the non-signer clause.* (Compare Appendix B with Appendix C.)

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[39] Cal. stat. 1931, c. 278.

[40] H. R. 11, 71st Cong., 1st Sess. (1929).

[41] The Capper-Kelly bill is printed in Appendix C. The Louisiana Fair Trade Law is printed in Appendix B. The Louisiana statute followed exactly the California statute, even in enacting into law a typographical error.

[42] Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting. 24 Calif. L. Rev. 640, 641 (1936).

[43] Cal. Stat. 1933, c. 260. This *non-signer clause* as added to the California Act reads as follows: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this act, whether the person so advertising, offering for sale or selling is not a party to such contract, is unfair competition and actionable at the suit of any person damaged thereby." There is little or no difference in the wording of this clause and the wording of the non-signer clause in the fair trade laws of other states.

In 1936, in the *Old Dearborn* case, the Court upheld the constitutionality of a state fair trade act, but pointed out that its opinion was restricted to the constitutionality of the Illinois Fair Trade Act and reiterated its position that a fair trade "agreement, nevertheless, constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Act." *Old Dearborn Dist. Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 195, 57 S. Ct. 139 (1936).

This language made it clear that notwithstanding the constitutionality of state fair trade laws, the *Dr. Miles* decision invalidating resale price maintenance contracts in interstate transactions was still good law. An exception to the Sherman Act, therefore was necessary at the federal level. *Here was the crucial point in the legislative history.* At that point all of the twelve state fair trade laws then in existence contained the non-signer clause, which had been added to the original California Fair Trade Law. If the proponents of resale price maintenance really had intended asking for broad enabling legislation covering non-contractual price-fixing along with contractual resale price maintenance, then was time to do it and candidly to inform Congress of the scope of their proposed legislation. This they did not do. *Was it because advocates of resale price maintenance knew that a Congress unwilling to enact a Capper-Kelly bill would never enact a federal fair trade law expressly covering non-signers?* The original Miller-Tydings bill, S. 3822 of the Seventy-Fourth Congress, was virtu-

ally identical with the Capper-Kelly bill,[44] drawn, introduced, and debated before the existence of fair trade acts or non-signer clauses. S. 3822 did not refer to non-signers. If the friends of the measure thought that S. 3822 might include *non-contractual* resale price manitenance, they were very careful to conceal the thought from Congress.

Neither Senate report[45] on S. 3822 nor Senator Tydings' explanation on the floor of the Senate mentions the non-signer clause in state acts or suggests that resale price maintenance by contract could be imposed upon strangers to such a contract. Senator Tydings' argument in favor of S. 3822 was that the bill "grows out of the fact that twelve states have all adopted acts within their states regulating loss-leader selling and the making of *contracts* between a manufacturer and a distributor of an article."[46] If the bill was "nothing more than an enabling act", it was an enabling act for resale price maintenance by *contract*. The Senate passed the bill; the House took no action.

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[44] Compare the Miller-Tydings Amendment (Appendix A) with the Capper-Kelly bill (Appendix C). Differences are largely owing to a difference in approach. The Capper-Kelly bill was an independent statute providing that resale price maintenance contracts were not violative of "any statute of the United States". The Miller-Tydings bill was an amendment to the Sherman Act. The purpose of S. 3822 was to permit "contracts or agreements prescribing minimum prices *or other conditions*. . . ." S. 3822 differs from the Capper-Kelly bill in that it added the phrase "or other conditions".

[45] Sen. Rep. No. 2053, 74th Cong., 2d Sess. (1936). "S. 3822 removes the doubt as to the applicability of the Sherman Act by expressly legalizing such *contracts* . . . In other words, the bill does no more than to remove Federal obstacles to the enforcement of contracts."

[46] 80 Cong. Rec. 8483. The non-signer clause, it should be noted, is aimed at fixing a uniform minimum retail price: loss-leader statutes are aimed at predatory selling below cost. Of the forty-five states which now have fair trade acts, thirty-one also have separate loss-leader ("Sales Below Cost", "Unfair Sales") statutes. See footnote 26 on p. 24.

Shortly after the Seventy-Fifth Congress convened in 1937, another Miller-Tydings bill was introduced, in the Senate by Senator Tydings (as S. 100), in the House by Representative Miller (as H. R. 1611). Here again was an opportunity for a straight-forward explanation that proponents of resale price maintenance wished to avoid the hazards of competition, not only by resale price maintenance *contracts* but by non-contractual price-fixing imposed on non-contracting parties. *Here again was the time to go beyond the Capper-Kelly language by adding a non-signer clause at the federal level just as California and the other states had to go beyond the Junior Capper-Kelly bill at the state level.* But S. 100 and H. R. 1611 follow S. 3822 of the previous session and the old Capper-Kelly bills; the bills contain no reference to non-signers. The Senate Report on S. 100 stated that the bill was similar to S. 3822 of the previous Congress and that the report on S. 3822 was applicable to S. 100. *Sen. Rep 257, 75th Cong., 1st Sess.* (1937).

However, for the first time an express mention of the non-signer clause appeared in a congressional report. House Report 382 on H. R. 1611, in a passing reference, stated that under state fair trade laws "*third parties* with notice are bound by the terms of a [fair trade] contract". The report does not discuss the non-signer problem. The Report explicitly provided:

> "The sole objective of the proposed legislation is to permit the public policy of states having fair trade acts to operate with respect to interstate *contracts* for the resale of goods within those states . . . In view

of the decision of the Supreme Court in *Dr. Miles Medical Co. v. Parker & Sons Co.*, 220 U. S. 373, and other cases, it is doubtful that *such contracts* are now valid in interstate commerce."

If Senator Tydings was under the impression that the bill permitted compulsory price-fixing by means of a non-signer clause, he managed to convey exactly the opposite impression. For example, he declared, "I have never voted for a price-fixing bill in my life."[47]

Before the Senate voted on the bill, President Franklin D. Roosevelt wrote the Senate a letter in which he stated that his "attention was called to S. 100, which would render legal certain *contracts* for the maintenance of resale prices now illegal under Federal law," [48] and he recommended that the bill be studied further. The President enclosed a letter of the Chairman of the Federal Trade Commission objecting to the measure, which shows that the Chairman had knowledge of non-signer clauses in state laws. The Chairman referred to the "peculiar feature" that "a private contract . . . apart from any supervision as to reasonableness is made binding upon all dealers and the consuming public". Other Administration objections had been voiced by the Department of Justice and the department of Agriculture.[49] After the President's letter was received, neither House acted on the legislation.

[47] 81 Cong. Rec. 7496. Senator Tydings had stated that he wanted to eliminate loss-leader selling, but avoided proposing a loss-leader bill because such laws could not be made permissive. Hearings before Subcommittee of Committee on the Judiciary on S. 100, 75th Cong., 1st Sess. 43 (1937).

[48] Sen. Misc. Doc. 58, 75th Cong., 1st Sess. (1937).

[49] FTC Report on Resale Price Maintenance LXII (1945).

H. R. 7472, an appropriation bill for the District of Columbia, passed the House June 18, 1937. When it was referred to the Senate Committee on the District of Columbia, an unrelated rider was attached. This rider, the Miller-Tydings bill, which appeared as Title VIII, was identical with S. 100 and H. R. 1611. On August 17, 1937 the President reluctantly [50] signed the bill and Title VIII was enacted into law as the Miller-Tydings Amendment to the Sherman Act.

Reviewing the congressional debates, one finds only two unequivocal statements that the proposed legislation would permit price maintenance against non-signers.[51] No majority report discusses specifically price-fixing forced on non-signers.[52] Neither Senator Tydings nor Representative Miller expressly adverted to the binding of non-signers in interstate transactions. The fact is, that the Miller-Tydings bills, like the Capper-Kelly bills, were presented to

[50] The President expressed the hope that the act "will not be as harmful as most people predict". N. Y. Times, Aug. 19, 1937, p. 26, col. 1.

[51] Senator King, an opponent, was not explicit although he referred to the non-signer clause and also read the letter of the Chairman of the Federal Trade Commission. 81 Cong. Rec. 7491, Representative McLaughlin, a proponent, was under the impression that H. R. 1611 legalized price maintenance against non-signers. This position is difficult to reconcile with his representation of the bill as purely permissive. "H. R. 1611 . . . is entirely a permissive act. It merely allows a seller and buyer of trade-marked or identified goods . . . to contract for resale of goods according to state law, *if they want to do so.* It does not compel the buyer and seller to enter a contract, but only authorizes them to do so, if they desire." 81 Cong. Rec. 8142.

[52] In a minority report on S. 100, Senator King quotes the letter of the Chairman of the Federal Trade Commission. Sen. Rep. 879, Part 2. A supplemental report of Representative Celler on H. R. 1611 mentions the non-signer clause. This report warned against the combination of pressure groups who were supporting this bill in order to secure higher prices. H. R. Rep. No. 382, 75th Cong., 1st Sess. (1937). *Cf.* Representative Celler's statement characterizing H. R. 1611 as a "coercive law . . . not either a fair trade law as written or a loss-leader law." Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 100, p. 5 (1937). See FTC Report on Resale Price Maintenance 60 (1945).

Congress as legislation to counteract the *Dr. Miles* case by authorizing resale price maintenance by contract. Representative Culkin, who spoke on the Capper-Kelly *and* Miller-Tydings bills, considered that their purposes were identical.[53]

As enacted, the language of the Miller-Tydings Amendment tracks the language of the Capper-Kelly bill. Before enactment, however, the Miller-Tydings bills contained a cryptic clause not present in the Capper-Kelly bills. This clause was deleted in H. R. 7472.

As introduced, S. 3822, S. 100 and H. R. 1611, would have legalized "contracts or agreement prescribing minimum prices *or other conditions*" for the resale of a commodity. The phrase *"or other conditions"* recalls the language of Justice Holmes' dissent in the *Dr. Miles* case in which he excluded from consideration any "attempt to attach a contract or condition to the goods . . . or in any way to restrict dealings with them after they leave the hands of the [contracting] retail men."[54] If this phrase had not been deleted, it might have been contended that these cryptic words authorized a restrictive condition or equitable covenant placed upon the use of the property.[55] Such an interpretation might have produced the effect of a non-signer clause. Whatever may have been intended by the phrase, the effect of the deletion was to conform the Miller-Tydings Amendment, as enacted, with the Capper-Kelly bill and with the contract clause of a typical fair trade law.

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[53] *Compare* 72 Cong. Rec. 9517 *with* 81 Cong. Rec. 8139-8140.
[54] 220 U. S. 373, 410-411 (1911).
[55] Chaffee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945 (1928); Beaudette and Berens, The Non-Signer Clause of Fair Trade Acts, 25 Notre Dame Law. 529, 541 (1950).

The deletion of the phrase "*or other conditions*" must be considered with another last minute amendment to the bill. This amendment added a proviso prohibiting horizontal resale price maintenance.[56] The effect of these two changes is to preclude enforcement of resale price maintenance contracts against non-signers. According to Senator Tydings, these changes obviated the objections of the administration to the Miller-Tydings bill as introduced.[57]

This carries the legislative history back, full circle, to the *Dr. Miles* case. As enacted into law, *without the phrase "or other conditions"*, the Miller-Tydings Amendment is simply the Capper-Kelly bill.

These are the central facts in the legislative history of the Miller-Tydings Amendment:

> (1) The Miller-Tydings Amendment is virtually identical with the Capper-Kelly bills, introduced to overcome the effect of the *Dr. Miles* case, prior to the existence of any state fair trade law;
>
> (2) The Miller-Tydings Amendment and the Capper-Kelly bill at the federal level are virtually identical with the contract clause of a typical fair trade law, but have no provision corresponding with the non-signer clause at the state level.

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[56] "The preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices . . . between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." But, by use of the non-signer clause it is possible to attain horizontal price-fixing control on entire level.

[57] ". . . The amendment I have offered was suggested by me and accepted by the Attorney General as curing the objections of the administration and . . . I think I am now in a position to say that the original objections have been eliminated." 81 Cong. Rec. 7496.

These compelling facts speak for themselves. They prove a clear congressional intent to narrow the application of the Miller-Tydings Amendment to *contracts* prescribing resale prices. They negative the inference that this exception to the national policy of a competitive economy was intended to apply to resale price maintenance imposed on non-signers.

Promoters of price-fixing by so-called "fair trade" laws may have thought they got what they wanted when the Seventy-Fifth Congress enacted the Miller-Tydings Amendment. They did *not* get what they needed to force price-fixing under color of law on unwilling, non-contracting parties in transactions affecting interstate commerce.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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CERTIFICATE.

This is to certify that copies of this Brief have been served on opposing counsel on this 19th day of March, 1951.

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APPENDICES.

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APPENDIX A

PERTINENT STATUTES

Sherman Anti-Trust Act, as Amended by Miller-Tydings Amendment

Every contract, *combination in the form of trust or otherwise,* or conspiracy, in *restraint of trade* or commerce among the several States, or with foreign nations, is hereby declared to be illegal; *Provided,* That nothing contained in sections 1-7 [the Sherman Act] of this title shall render illegal, *contracts or agreements* prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, *when contracts or agreements* of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, *and the making of such contracts or agreements,* shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further,* That the preceding proviso shall not make lawful *any contract or agreement,* providing for the establishment or maintenance of minimum resale prices on any commodity herein in-

volved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX B

Louisiana Fair Trade Act

AN ACT.

To protect trade mark owners, distributors and the public against injurious and unecomonic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

Section 1. *No contract* relating to the *sale* or *resale* of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the *producer or owner* of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:

1. That the *buyer* will not *resell* such commomity except at the *price stipulated by the vendor.*

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, *resell* except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed *to contain or imply conditions* that such commodity *may be resold* without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Section 2. *Wilfully* and *knowingly* advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is *unfair competition* and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. The following terms, as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

Section 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Section 6. This Act may be known and cited as "Fair Trade Act." Approved by the Governor: June 26, 1936.

APPENDIX C.

CAPPER-KELLY BILL

H. R. 11, 71st Cong., 1st Sess. (1929).

A bill to protect trade-mark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trade-mark, brand, or name.

Section 1. No contract relating to the sale or resale of a commodity which bears (or the label or container of which bears) the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed unlawful as against the public policy of the United States or in restraint of interstate or foreign commerce or in violation of any statute of the United States by reason of any agreement contained in such contract—

(1) That the vendee will not resell such commodity except at the price stipulated by the vendor and/or

(2) That the vendee will require any dealer to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or by such vendee.

Section 2. Any such agreement in a contract in respect to interstate or foreign commerce in any such commodity shall be deemed to contain the implied condition that such commodity may be resold without reference to such agreement—

(1) In closing out the owners stock for the purpose of discontinuing dealing in such commodity;

(2) With prominent notice to the public that such commodity is damaged or deteriorated in quality, if such is the case, or

(3) By a receiver, trustee, or other officer acting under the orders of any court.

Section 3. Nothing contained in this act shall be construed as legalizing any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. [Relates to jurisdiction of federal courts in enforcement actions].

Section 5. As used in this act—

(1) The term "producer" means grower, packer, maker, manufacturer, or publisher.

(2) The term "commodity" means any subject of commerce.

(3) [Defines "interstate or foreign commerce"].

APPENDIX D

A COMPARISON

Capper-Kelly Bill H. R. 11, 71st Cong., 1st Sess.	Miller-Tydings Bill S. 100, H. R. 1611, 75th Cong., 1st Sess.
"No *contract* relating to **the sale** or resale **of a commodity which bears (or the label or container of which bears) the trade mark, brand, or name of the producer** or owner **of such commodity, and which is in** fair **and open competition with commodities of the same general class produced by others,** shall be deemed unlawful by reason of any agreement contained in such contract—(1) That the vendee shall not resell such commodity except at the price stipulated by the vendor—and/or (2) That the vendee will require any dealer to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or such vendee . . ."	"Nothing contained [in the Sherman Act] shall render illegal *contracts or agreements* prescribing minimum prices or other conditions for **the sale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer** or distributor **of such commodity, and which is in** free **and open competition with commodities of the same general class produced** or distributed **by others** when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia . . ."

APPENDIX E.

LEGISLATIVE BACKGROUND OF MILLER-TYDINGS AMENDMENT

I. Introduction.

The Miller-Tydings Amendment has a long legislative history extending far beyond the debates and reports of the Seventy-Fifth Congress which in 1937 enacted it as an amendment to the Sherman Act. The bill that became the Miller-Tydings Act is the last of a series of closely related bills that began with the Stevens bill in 1914.

Prior to the Sherman Act, this Court held that a resale price maintenance contract was not illegal as a common law restraint of trade. *Fowle v. Park*, 131 U. S. 88 (1889).[1] In 1911 the Court decided the *Dr. Miles* case, holding that the Sherman Act had modified, by statute, the rule of *Fowle v. Park*, and that a resale price maintenance contract was violative of the Sherman Act.[2] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911.)

[1] *Fowle v. Park* was restricted, in the *Dr. Miles* case, to being authority only for the doctrine that a secret process might be the subject of confidential communication and of sale or license to use with restrictions as to prices. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 402 (1911).

[2] Notwithstanding the Sherman Act, resale price maintenance has been permitted in restricted areas of the economy under the patent laws [*Bement v. National Harrow Co.*, 186 U. S. 70 (1902) ("licenses" under the patent laws); *United States v. General Electric Co.*, 272 U. S. 476 (1926) (patent licenses combined with agency-contracts)], but even in these restricted areas, the rights of the patentee are limited. [*Bauer v. O'Donnell*, 229 U. S. 1 (1913); *United States v. Ethyl Gasoline Corporation*, 309 U. S. 436 (1940)]. However, the copyright laws grant no such immunity. *Bobbs Merrill Co. v. Strauss*, 210 U. S. 339 (1910). A producer may "suggest" resale prices to his vendee [*Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U. S. 208 (1921)] and may refuse to sell to those who fail to maintain resale prices [*United States v. Colgate*,

The *Dr. Miles* case aroused great interest. A vigorous dissent by Mr. Justice Holmes, expressing disagreement with the Court's reasoning, urged the validity of resale price maintenance *contracts*. The dissent phrased the question before the Court in the following language:

> "There [was] no attempt to attach a condition or conditions to the goods . . . The only question [was] whether the law forbids a purchaser to *contract* with his vendor that he will not sell below a certain price." [3]

That decision marks the beginning of attempts to obtain federal legislative sanction for resale price maintenance contracts. All proposed legislation relating to resale price maintenance in transactions affecting interstate commerce, beginning shortly after the *Dr. Miles* case in 1911 and terminating with the enactment of the Miller-Tydings Act in 1937, must be examined in light of this case.

II. The Capper-Kelly Bill.

In 1914,[4] the first federal bill legalizing resale price maintenance was introduced in the Sixty-Third Congress [5] by Representative Stevens of New Hampshire.

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250 U. S. 301 (1919)]. But when the refusal to sell is combined with an express or implied resale price maintenance contract, the manufacturer violates the antitrust laws. *United States v. Schrader's Sons*, 252 U. S. 85 (1920) (express contract held to be invalid under *Dr. Miles* case); *Federal Trade Commission v. Beech-Nut Packaging Co.*, 257 U. S. 441 (1922) (implied contract held to violate Federal Trade Commission Act).

[3] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 410 (1911).

[4] 54 Cong. Rec. 2377-8.

[5] H. R. 13305, 63d Cong., 2d and 3d Sess. (1914), introduced Feb. 12, 1914 by Representative Raymond B. Stevens of New Hampshire.

The proposed legislation was intended to avoid the *Dr. Miles* decision by authorizing contracts prescribing a "uniform price at which each article covered by such contract may be resold".[6] Under the provisions of this bill, any producer, grower, manufacturer, or owner of an identified article would be authorized to establish, by contract with the dealers, the resale price of the article when sold in interstate commerce.[7] The Stevens bill was not reported out of the House Committee.

In the Sixty-Fourth Congress, the Stephens bill,[8] similar to the Stevens bill of the preceding Congress, was introduced.[9] Although a hearing was held,[10] again the Congress failed to enact resale price maintenance legislation.

Thereafter, until 1933, sponsors of resale price maintenance introduced in each term of the Congress a version of the basic resale price maintenance known as the Kelly or the Capper-Kelly bill.[11] Although differing slightly from the two preceding bills, the purpose of these bills was identical: to overcome the effect of the *Dr. Miles* case by enacting legislation to

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[6] The avowed purpose of the bill was "to prevent discrimination in prices to dealers and to the public". Hearings before Committee on Interstate and Foreign Commerce on H. R. 13305, 63d Cong., 2d and 3d Sess. 3 (1914). See also the Metz bill, H. R. 13860, 63d Cong., 2d Sess. (1914), the purpose of which was "to prevent discrimination between different consumers and localities by establishing uniform prices for uniform commodities".

[7] FTC Report on Resale Price Maintenance, 40 (1945).

[8] H. R. 13568, 64th Cong., 1st Sess. (1916), introduced by Representative Dan B. Stephens of Nebraska.

[9] The purpose of the Stephens bill, according to its title, was "to protect the public against dishonest advertising and false pretenses in merchandising".

[10] Hearings before Committee on Interstate and Foreign Commerce on H. R. 16568, 64th Cong., 1st Sess. (1916).

[11] Rose, Resale Price Maintenance, 3 Vanderbilt L. Rev. 24, 42 (1949).

permit resale price maintenance by contract in interstate commerce.[12]

In the Sixty-Fifth, Sixty-Sixth, Sixty-Seventh, and Sixty-Eighth Congresses, the Kelly bill was introduced,[13] but no hearings were held and in each term the bill failed of passage. In the Sixty-Ninth Congress, Representative Kelly introduced a new version of the Kelly bill,[14] which differed in form but not in substance from the prior bills.[15] Although extensive hearings were held by the House Committee,[16] the Congress again failed to enact legislation to permit resale price maintenance by contract in interstate commerce. And again in the Seventieth Congress (1928), the Kelly bill failed of enactment.[17]

The Seventy-First Congress convened in 1929. In the first session, the Capper-Kelly fair trade bill[18] was

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[12] *Ibid.*; FTC Report on Resale Price Maintenance, 41 (1945).

[13] These bills, which were sponsored primarily by Representative Clyde Kelly of Pennsylvania, were designed, according to their titles, "to protect the public against false pretenses in merchandising under trade-mark or special brand of articles of standard quality". Hearings before Committee on Interstate and Foreign Commerce on H. R. 11, 69th Cong., 1st Sess. (1926).

[14] The caption of the bill was changed to read:

"A BILL TO clarify the law, to promote equality thereunder, to encourage competition in production and quality, to prevent injury to goodwill, and to protect trade-mark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trade-mark, name, or brand."

[15] FTC Report on Resale Price Maintenance, 41 (1945).

[16] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 11, 69th Cong., 1st Sess. (1926).

[17] The Kelly bill of the Seventieth Congress precipitated an examination by the Federal Trade Commission of the desirability of resale price maintenance. The purpose of the report was to investigate the effect of the proposed legislation on the consumer—"a comparatively inarticulate element of society". The Report, submitted to the Congress on January 30, 1929, opposed resale price maintenance. H. Doc. 546, 70th Cong., 2d Sess. (1929).

[18] Senator Capper indicates the bill was first labeled a "fair trade bill" in the Sixty-Ninth Congress, in 1925. 75 Cong. Rec. 14977. See also 76 Cong. Rec. 826. Senator Capper, in a letter to Representative Kelly dated Jan. 21, 1931, refers to the bill as the "Capper-Kelly fair trade bill". 74 Cong. Rec. 3009. In the House debate, Representative Kelly refers to his bill as a "fair trade" bill. 74 Cong. Rec. 3485.

introduced in the House and Senate.[19] As introduced, the bill provided:

> "That no contract relating to the sale or resale of a commodity which bears (or the label or container of which bears) the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed unlawful as against the public policy of the United States or in restraint of interstate or foreign commerce or in violation of any statute of the United States . . .. by reason of any agreement contained in such contract—
>
> (1) That the vendee will not resell such commodity except at the price stipulated by the vendor and/or
>
> (2) That the vendee will require any dealer to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or by such vendee."[20]

No action was taken on the bill.[21] In the second session,[22] the House Interstate and Foreign Com-

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[19] S. 240, H. R. 11, 71st Cong., 1st Sess. (1929). Both bills bore the title:

"A bill to protect trade-mark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trade-mark, brand, or name."

[20] The balance of the bill parallels the original fair trade acts, without the non-signer clause. See Appendix C, where the bill is set forth in full.

[21] S. 240, to Senate Committee on Interstate Commerce. 71 Cong. Rec. 105. H. R. 11, to House Committee on Interstate Commerce. 71 Cong. Rec. 27.

[22] December 2, 1929 through July 3, 1930.

merce Committee reported [23] the Capper-Kelly bill favorably, with an amendment.[24]

This bill is important. It was the model for the first fair trade law, the California Act of 1931,[25] which has been called the *"Junior Capper-Kelly bill"*.[26] The Capper-Kelly bill contained no non-signer clause; nor did the California statute in 1931. Not until 1933 was the non-signer scheme devised. In that year the California Fair Trade Act was amended by the addition of a non-signer clause (Section 1½).

The purpose of the Capper-Kelly bill was the same as that of prior and subsequent proposed bills—to avoid the effect of the *Dr. Miles* case. This conclusion is apparent from the House Report[27] and the remarks on the House floor by Representative Francis D. Culkin of New York.[28]

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[23] H. R. Rep. 536, 71st Con., 2d Sess. (1930), submitted January 7, 1930. 72 Cong. Rec. 2487. Minority report filed February 1, 1930, 72 Cong. Rec. 2857.

[24] For Representative Kelly's supporting remarks, see 72 Cong. Rec. 325-332.

[25] The first section of the bill, as amended in committee, provided:

"That no contract relating to the sale of a commodity which bears (or the label or container of which bears) the trade-mark, brand, or trade name of the producer of such commodity, and which is in fair and open competition with commodities of the same general class, shall be deemed unlawful, as against the public policy of the United States, or in restraint of interstate or foreign commerce, or in violation of any statute of the United States, by reason of any agreement contained in such contract—That the vendee will not resell such commodity except at the price stipulated by the vendor." H. Rep. 536, 71st Cong., 2d Sess. 1 (1930). See also 74 Cong. Rec. 3533.

A comparison of the bill as introduced and the bill as amended, is available at 74 Cong. Rec. 3533, 3534.

[26] Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting, 24 Calif. L. Rev. 640, 641 (1936).

[27] H. R. Rep. 536, 71st Cong., 2d Sess., Part 2 (1930), *passim*.

[28] Mr. Culkin envisages the purpose of the legislation to be the writing into law of the dissent in the *Dr. Miles* case. 72 Cong. Rec. 9517.

In the third session of the Seventy-First Congress[29], Representative Kelly, in the debates on the floor of the House,[30] stated:

> "Up to that time [1911] any independent manufacturer could make an agreement with a distributor as to resale prices, but that right was taken away by a decision of the Supreme Court in the *Doctor Miles* case.[31]

He pointed out that the bill was designed "to restore a right which was universally held up until [the date of the *Dr. Miles* decision]."[32]

No sponsor of the bill, nor even its most articulate opponent,[33] ever suggested that the act conceivably could be used against any but parties to the contracts. At worst, it was envisaged that a manufacturer might obtain by coercion contracts from all parties, by use of his right to refuse to sell those wholesalers who would not require all retailers to execute such contracts.[34]

After considerable debate, the bill passed the House. When the bill went to the Senate, it was referred to the Committee on Interstate Commerce.[35] Senator Capper, co-author of the bill, spoke on its behalf,[36]

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[29] December 1, 1930 through March 4, 1931.
[30] See 74 Cong. Rec. 138-156, 358-361.
[31] *Id.*, at 361.
[32] *Id.*, at 361. For other statements to the same effect, see 74 Cong. Rec. 2398, 3485, 3527. In the earlier House debate, most members who discussed the bill conceded this effect. 74 Cong. Rec. 150 *et seq.* See also 74 Cong. Rec. 3483 *et seq.*
[33] Representative E. E. Cox of Georgia.
[34] 74 Cong. Rec. 2377-8.
[35] *Id.*, at 3629.
[36] *Id.*, at 3629.

but it died in the Committee when the Congress adjourned.[37]

When the Seventy-Second Congress convened for its first session,[38] the Capper-Kelly bill was introduced in the House and Senate.[39] The Senate Committee reported the bill "without recommendation" in a report entitled "Capper-Kelly Fair Trade Bill".[40] This report, like the House Report of the previous Congress, indicated the purpose of the bill to permit resale contracts held invalid in the *Dr. Miles* case.[41] Senator Capper made similar statements.[42] Although the bill was discussed in the Senate[43] the Senate failed to pass the measure. Nor, in this session of Congress, did the House take any action.

In the second session of the Seventy-Second Congress,[44] the Capper-Kelly bill was debated on the

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[37] Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting, 24 Calif. L. Rev. 640, 641 (1936).

[38] The first session extended from December 7, 1931 through July 7, 1932.

[39] H. R. 11, S. 97, 72d Cong., 1st Sess. (1932). The title was identical with the title of the same bill in the previous Congress. See footnote 19, *supra*. In the House, H. R. 11 was referred to the Committee on the Judiciary; in the Senate, S. 97 was referred to the Committee on Interstate Commerce.

[40] Sen. Rep. 441, 72d Cong., 1st Sess. (1932).

[41] *Id.*, at 4. The report states: "This bill only legalizes an agreement as to resale price between the vendor and vendee of an identified, standard product, which is in competition with other articles of the same class . . . This agreement was held legal in interstate commerce through a long series of decisions by Federal courts up to 1911, when it was ruled invalid by the Supreme Court in the Dr. Miles Medical Co. case."

[42] Senator Capper stated: "This measure . . . would restore the freedom of contract between manufacturer and merchant, a freedom taken away by a Supreme Court opinion several years ago . . ." 75 Cong. Rec. 14989 (1932). See also 76 Cong. Rec. 829. A similar statement was made by Senator Copeland, another proponent of the bill, who urged: "Let us respond to the need pointed out in the opinion of Mr. Justice Holmes in the Miles case. We can do this by passing . . . S. 97." 75 Cong. Rec. 14989.

[43] *Id.*, at 11713, 14976.

[44] December 5, 1932 through March 4, 1933.

floor of the Congress on several occasions.[45] In the House debate, it should be noted that the purpose of the bill was reiterated.[46] The Seventy-Second Congress adjourned without any further action being taken on the Capper-Kelly bill, and the bill thereby failed of enactment.

The adjournment of the Seventy-Second Congress marked the temporary cessation of activity on a national level by advocates of resale price maintenance.[47] Lack of pressure by proponents of fair trade was attributable to the fact that their objective had been attained otherwise. Soon after the Seventy-Third Congress convened, the National Industrial Recovery Act was enacted. Retail Codes of Fair Competition, adopted pursuant to its provisions, permitted resale price maintenance.[48]

Thus, from the date of the Dr. Miles case, advocates of resale price maintenance urged Congress to write into the law the dissenting opinion of Justice Holmes. But in no version of the Capper-Kelly bill or any other Congressional bill was the non-signer clause proposed.

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[45] 76 Cong. Rec. 482, 822, 826, 915, 919.

[46] For example, Representative Bulkley said: "By this measure [S. 97] it is proposed to restore to producers and distributors of trade-marked products the liberty of contract of which they were deprived in 1911 by . . . the Doctor Miles . . . case." 76 Cong. Rec. 482. See also the statement of Rep. Kelly, *Id.*, at 3569.

[47] In the Seventy-Third Congress, which convened on March 4, 1933, Senator Capper and Representative Kelly introduced further bills, entitled bills to define the intent of the antitrust laws as to certain agreements. See H. R. 3100, H. R. 3677, S. 299, S. 497, 73d Cong., 1st Sess. (1933). But no further action was taken.

[48] FTC Report on Resale Price Maintenance, 43 (1945).

III. The Miller-Tydings Bill.

A—Seventy-Fourth Congress—Second Session, S. 3822.

The appetite of advocates of resale price maintenance for guaranteed profit without competition had been "whetted"[49] under the N. R. A.'s Codes of Fair Competition.

The first attempt after the Capper-Kelly bill to obtain federal legislative sanction for resale price maintenance in transactions affecting interstate commerce was made in the second session of the Seventy-Fourth Congress. On January 27, 1936, Senator Tydings introduced Senate Bill No. 3822,[50] the first version of the bill which was to become known as the "Miller-Tydings bill". This bill was substantively identical with its predecessor, the Capper-Kelly bill. The differences in phraseology and format and these differences are minor[51]—derive from the different legislative approaches of the two bills. Unlike the Capper-Kelly bill, which was proposed as an independent statute to provide that resale price maintenance contracts should not be deemed violative of "any statute of the United States", the Miller-Tydings bill proposed directly to amend the Sherman Act.

Although this first version of the Miller-Tydings bill was similar in most respects to the Miller-Tydings Amend-

[49] Rose, Resale Price Maintenance, 3 Vanderbilt L. Rev. 24, 45 (1949).
[50] S. 3822, 74th Cong., 2d Sess. (1936). 80 Cong. Rec. 1007.
[51] See Appendix D.

ment, as enacted, the provisions were not identical.[52] After reference to the Senate Judiciary Committee, S. 3822 was reported favorably out of committee without amendment.[53] On June 1, 1936, the Senate passed the bill without amendment.[54] After the bill went to the House, it was referred to the House Judiciary Committee.[55] When the Congress adjourned nineteen days later, the House had received no committee report on the bill, and had taken no action.

Notwithstanding the failure of the Seventy-Fourth Congress to enact S. 3822, the striking similarity (indeed substantial identity)[56] between this bill and the Miller-Tydings bill, as introduced in the Seventy-Fifth Congress, makes Congressional comment upon this bill bear directly upon the interpretation of the Miller-Tydings Act, as enacted.[57]

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[52] The pertinent provisions of S. 3822, 74th Cong., 2d Sess., were:
". . . section 1 of the [Sherman] act . . . is amended [by adding the following proviso] . . .
"*Provided*, That nothing herein contained shall render illegal *contracts or agreements prescribing minimum prices or other conditions* for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer of such commodity, and which is in free and open competition with commodities of the same general class produced by others, when contracts or agreements of that description are lawful as applied to intrastate transactions." 80 Cong. Rec. 8433. The phrase "or other conditions", it should be noted, was not in the Capper-Kelly bill.

[53] Sen. Rep. 2053, 74th Cong., 2d Sess. (1936).

[54] 80 Cong. Rec. 8433.

[55] *Id.*, at 8871.

[56] As will be discussed subsequently, the Miller-Tydings act, as enacted, was derived almost entirely from H. R. 1611 and S. 100 (similar to H. R. 1611) of the 75th Cong., 1st Sess. The only differences between S. 3822 (74th Cong., 2d Sess.) and H. R. 1611 (75th Cong., 1st Sess.) was the addition in H. R. 1611 to the terms of S. 3822 of the phrases "or distributor" following the word "producer", and "or distributed", following the word "produced".

[57] The Senate Committee on the Judicial considered S. 100 (75th Cong., 1st Sess.) so similar to S. 3822 (74th Cong., 2d Sess.) that its Report (Sen. Rep. No. 257) on S. 100 quoted the entire report (Sen. Rep. No. 2053) on S. 3822. *Supra*, note 53.

At no time in the legislative consideration of S. 3822 was the non-signer clause mentioned. As a matter of fact, S. 3822 was presented to the Congress as a remedy for "loss-leader" sales, *i. e.*, sales in which products are sold below their cost in order to attract customers into the seller's store.[58] Its author, Senator Tydings, gave the following explanation of the bill on the Senate floor:

> ". . . this bill was reported unanimously from the Committee on the Judiciary after hearings were held. It grows out of the fact that 12 states—[states listed]—have all adopted acts within their states regulating loss-leader selling and *the making of contracts between a manufacturer and a distributor of an article.* This has been done in an effort to make trade equal and fair and to eliminate discrimination. After hearings, the Committee reported the bill unanimously and favorably. It simply backs up the action of those states which have already enacted valid laws which have been passed on by the courts."[59]

The explanation is oversimplified; for fair trade acts legalizing resale price-fixing have no necessary relation to loss-leader acts aimed at the predatory trade practice of selling below cost.[60]

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[58] 80 Cong. Rec. 8433. See also Sen. Rep. No. 2053, 74th Cong., 2d Sess., 2 (1936).

[59] 80 Cong. Rec. 133.

[60] Rose, Resale Price Maintenance, 3 Vanderbilt L. Rev. 24, 47-53 (1949). In transactions affecting interstate commerce, the anti-trust laws and actions by the Federal Trade Commission are fully capable of meeting this danger. Comment, *Sales Below Cost Prohibitions*, 57 Yale L. Jour. 391, 400 (1948). Most states have enacted loss leader statutes prohibiting sales below cost, plus a mark-up of 5% or 6%, which would preclude loss leader selling in purely intrastate transactions. *Ibid.* Louisiana has a "loss leader" statute, prohibiting sales below cost plus a mark-up of 6%, which has been held to be constitutional. La. Act 256 of 1946; Louisiana Wholesale Distributors Ass'n. v. Rosenzweig, 214 La. 1, 36 So. (2d) 406 (1948).

A more thorough and more exact explanation of the bill is contained in the Committee Report.[61] In commenting upon resale price maintenance in intrastate transactions, the Report states that a fair trade act authorizes

> "a manufacturer or producer of a commodity . . . to make a *contract* that the *purchaser* will not resell such commodity except at the price stipulated . . ."

The Report concludes that S. 3822 will alleviate these doubts:

> "S. 3822 removes the doubt as to the applicability of the Sherman Act by expressly legalizing *such contracts* where legal under the laws of the State where made or where they are to be performed . . . . In other words, *the bill does no more than to remove Federal obstacles to the enforcement of contracts* which the states themselves have declared lawful."[62]

It should be noted that the Committee discussed S. 3822 as a means of legalizing *contracts* only, and makes particular mention of common law contracts for resale price maintenance—*equating* such contracts with the contracts made pursuant to fair trade laws.

B—Seventy-Fifth Congress—First Session, 1-S. 100, H. R. 1611.

On January 5, 1937, Mr. Miller introduced in the House H. R. 1611.[63] This bill was almost identical with the

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[61] Sen. Rep. No. 2053, 74th Cong., 2d Sess. (1936).

[62] Sen. Rep. 2053, 74th Cong., 2d Sess. (1936). This report is quoted verbatim in both Senate Reports made on the Miller-Tydings bill (S. 100) in the Seventy-Fifth Congress, in lieu of new reports. Sen. Rep. No. 257, Sen. Rep. No 879, 75th Cong. 1st Sess.

[63] H. R. 1611, 75th Cong., 1st Sess., was entitled "A bill to amend the act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies' approved July 2, 1890." 81 Cong. Rec. 34. Hereafter, unless otherwise noted, all footnote references are to reports, documents, and debates of the 75th Congress, First Session (1937).

version (S. 3822) of the previous Congress.[64] It was referred to the House Committee on the Judiciary.[65]

On the following day, Senator Tydings introduced in the Senate S. 100, which was referred to the Senate Committee on the Judiciary.[66] The committees reported the bills favorably.

The House Report on H. R. 1611[67] sets forth the basis of the Committee's recommendation:

> "The sole objective of the proposed legislation is to permit the public policy of States having fair-trade acts to operate with respect to interstate *contracts* for the resale of goods within those states. The fair-trade acts referred to legalize the maintenance, by *contract*, of resale prices of branded or trade-marked goods which are in free competition with goods of the same general class.
>
> "To accomplish this end, the reported bill amends Section 1 of the Sherman Anti-trust Act which declares every contract in restraint of trade illegal. The amendment adds a sentence to the section, in the nature of a limitation, to the effect, in substance, that

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[64] The pertinent provisions of H. R. 1611, were:
". . . section 1 of the [Sherman] act . . . is amended [by adding the following proviso] . . . Provided that nothing herein contained shall render illegal *contracts or agreements prescribing minimum prices or other conditions* for the sale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity, and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions . . . ." H. R. Rep. No. 382; 81 Cong. Rec. 2133.

[65] 81 Cong. Rec. 34.

[66] 81 Cong. Rec. 66. There were minor differences in phraseology between S. 100 and H. R. 1611.

[67] H. R. Rep. No. 382.

> nothing therein contained shall render illegal *contracts* prescribing minimum prices or other conditions for resale of branded or trade-marked goods when such *contracts* are lawful as to intrastate transactions under the State law of the State in which the resale is to be made. . . .
>
> "*In view of the decision of the Supreme Court in Dr. Miles Medical Co. v. Parker & Sons Co.* (220 U. S. 373), *and other cases, it is doubtful that such contracts are now valid in interstate commerce.*"

The Committee considered the amendment as legalizing only price maintenance *contracts* of the type which the *Dr. Miles* case had held to violate the Sherman Act. The entire tenor of this section of the Report is that the purpose of the amendment is to avoid the *Dr. Miles* decision and to legislate it out of existence by amending the Sherman Act to permit the type of contract held illegal in that decision—and nothing more. *The contract in that case did not purport to bind any parties other than contracting parties.* This, therefore, was the type of contract which the House Committee intended to validate.

A typical fair trade act (including a non-signer clause) is set forth in the Report, but there is no discussion of the non-signer clause.[68] *The fact that the Committee had knowledge of the non-signer clause of the fair-trade acts and did not extend the scope of H. R. 1611 to parallel the non-signer clause, clearly demonstrates that the Committee did not intend to approve this provision.*

[68] A supplemental report by Representative Celler, joined by Representative Ramsey, does make specific reference to the non-signer provision *of state laws.* H. R. Rep. 382, Part 2, 24.

The Senate Committee also reported S. 100 out favorably, with amendments.[69] The Report stated that since S. 100 was "similar" to S. 3822 of the Seventy-fourth Congress, second session, the Report on S. 3822 was applicable to this legislation (S. 100). The Report then incorporated and set forth in its entirety the Report of the previous Congress.[70]

After receipt of the respective committee reports, neither house of the Congress acted with respect to the Miller-Tydings bill. On April 27, 1937, the day on which Senate action on S. 100 was expected,[71] President Roosevelt addressed to the President of the Senate a letter in which he recommended that the possible effects of S. 100 be studied further.[72] Annexed to President Roosevelt's letter was a memorandum from the Chairman of the Federal Trade Commission detailing the Commission's objections to S. 100.[73] Other Administration objections had been voiced by the Department of Justice and the Department of Agriculture.

In his letter, the President stated:

> "My attention was called to S. 100, which would render legal certain *contracts* for the maintenance of resale prices now illegal under Federal law."

[69] Sen. Rep. No. 257.
[70] See footnote 52, *supra*.
[71] CCH Trade Regulation Service (9th ed.) V. 2, para. 7058.
[72] 81 Cong. Rec. 3838. See Sen. Misc. Doc. No. 58, being a letter dated April 24, 1937, by President Roosevelt to the President of the Senate, together with an enclosure.
[73] Sen. Misc. Doc. No. 58, the enclosure annexed to the President's letter, being a letter, dated April 14, 1937, by W. A. Ayers, Chairman of the Federal Trade Commission, addressed to President Roosevelt.

The President suggested that Congress authorize the Federal Trade Commission to bring down to date a 1929 study of resale price maintenance—a proposal upon which Congress failed to act.

The letter of Chairman Ayres of the Federal Trade Commission which was forwarded to the Senate as an enclosure to President Roosevelt's letter indicates that the Commission was hostile to federal sanction of any resale price maintenance. This letter did point out the non-signer provisions of state laws and indicate that this clause, *under the provisions of S. 100*, would be applicable to interstate transactions.[74] However, later in that same year, after adoption of the Miller-Tydings Amendment, the Federal Trade Commission apparently had changed its position as to the scope of the Amendment. Shortly after Congress enacted the Amendment, Chairman Ayres warned that the Sherman Act might still be invoked against resale price maintenance not within the restricted scope of the Amendment. He warned:

> "The Tydings-Miller Act gives Federal sanction only to contracts between individual producers and individual distributors. . . . . In such cases resale price maintenance enforceable by contract is permissible. . . . For deviations from this permissive and limited right allowed by the Tydings-Miller Act, . . . the antitrust laws still are available. . . ."[75]

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[74] Chairman Ayres stated:

"A peculiar feature of many of the state laws which would, under a recent decision of the Supreme Court . . . [the *Old Dearborn* case, 57 S. Ct. 147] . . . thus be made binding upon interstate commerce is that they require wholesalers and retailers to conform to the provisions of private resale price maintenance contracts to which they are not parties. . . ."

[75] Address by Chairman Ayres before the National Wholesale Druggists' Ass'n. Convention, Oct. 4, 1937. CCH Trade Regulation Service (9th Ed.), V. 2, Para. 7091.

After receipt of the President's letter, the Senate took no further action on S. 100 and the House similarly took no further action on H. R. 1611.[76]

2—H. R. 7472.

On June 10, 1937, there was introduced in the House H. R. 7472—"A bill to provide additional revenue for the District of Columbia and for other purposes."[77] This bill was favorably reported without amendment.[78] After debate upon the various features of the bill[79] and a summary of the bill by its author,[80] H. R. 7472 was finally passed, after considerable amendment,[81] on June 18, 1937.

When H. R. 7472 was referred to the Senate, it was sent to the Committee on the District of Columbia. In Committee, an unrelated rider was attached to H. R. 7472. This rider, which appeared as Title VIII of the bill, was the Miller-Tydings bill "to legalize resale price maintenance contracts".[82] The language of the rider was similar to that of S. 100, except for *one major difference*. While S. 100 (and H. R. 1611) had sought to legalize "contracts or agreement prescribing minimum prices *or other conditions* for the resale of a commodity", Title VIII of H. R. 7472 was amended to legalize only "contracts

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[76] *Id.*, at Para. 7058.
[77] 81 Cong. Rec. 5631.
[78] H. R. Rep. No. 1016.
[79] 81 Cong. Rec. 5667, 5689, 5896, 5905, 5946.
[80] *Id.*, at 5904, 5905.
[81] *Id.*, at 5984.
[82] CCH Trade Regulation Service (5th ed.), V. 2, para. 7058. The original Title VIII of H. R. 7472, as passed by the House, was a provision for a tax on business privilege in the District of Columbia. 1 Toulmin's Anti-Trust Laws (Anderson's ed. 1949) 228.

or agreements *prescribing minimum prices* for the resale or a commodity."[83]

On July 7, 1937, H. R. 7472 was reported from committee with amendments and a report submitted.[84] This Report, Sen. Rep. No. 879, stated:

> "Title VIII of the bill, as reported by your committee, includes a provision amending the anti-trust laws which incorporates the provisions of Senate Bill 100, which was reported from the Committee on the Judiciary on March 29, 1937. In reporting S. 100, the Committee on the Judiciary incorporated a report on a similar bill (S. 3822) which was made during the Seventy-Fourth Congress. That report, which is also applicable to S. 100 and to Title VIII of this bill, is as follows. . . ."

Here the Committee quoted in full the language of the previous Senate Report. The Committee did not comment upon the deletion of the phrase "or other conditions" from S. 100. In its quotation of the previous Senate Report, however, the Committee refers *only to contracts*, makes no reference to the "non-signer clause", and makes no effort to extend the language of S. 100 to parallel Section 2 (the non-signer clause) as well as Section 1, of the typical fair trade act.

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[83] The full text of the first proviso clause contained in H. R. 7472, Title VIII, read as follows when reported out of committee:

"Provided, that nothing herein contained shall render illegal *contracts or agreements prescribing minimum prices* for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as to intrastate transactions. . . ."

[84] Sen. Rep. No. 879.

Senator King submitted the views of the minority on H. R. 7472, and his views were printed as part 2 of Sen. Rep. No. 879. The minority strongly objected to attaching unrelated riders to legislation, and suggested that S. 100 be brought before the Senate on its merits alone. The minority report then sets forth the letters of the President and of the Chairman of the Federal Trade Commission,[85] discusses the economic arguments of the proponents of S. 100,[86] and refers to the possibility that the act will legalize price-fixing in interstate commerce.[87]

Senator Tydings explained on the floor:

"... I wish to make a very brief statement in explanation of the pending amendment.

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[85] See footnotes 72, 78, *supra*.

[86] Sen. Rep. No. 879, Part 2 (Minority Report), p. 8.

"My information is that the opponents of S. 100 have indicated a willingness to withdraw opposition to the same if an amendment were inserted in the proposed law that would in effect limit its provisions to prevent sales below cost. An amendment, as I am advised, was suggested that any resale price fixed under contracts, pursuant to the provisions of S. 100, shall not be higher than actual invoice cost to the seller. The contention was made that an amendment of this character would meet all legitimate requirements. I am further advised that it was proposed that the opponents of S. 100 were willing to support a 5-percent margin above invoice cost believing that this would definitely prevent loss-leader selling and at the same time guard against actual price fixing. The proposition was not, as I understand, acceptable and objection was made to an amendment . . . which conferred authority upon the Federal Trade Commission to exercise some supervision and control under provisions providing for fixed prices where such prices appeared unfair and unreasonable. . . ."

[87] Sen. Rep. No. 879, Part 2 (Minority Report), p. 6.

"And it should not be forgotten that these price contracts are not necessarily made with each wholesaler or retailer who resells the goods. The Supreme Court has always held valid, in the California and Illinois cases, the section of these State laws that allows the manufacturer or wholesaler by having only one contract in a state to force his fixed price on other dealers within the State by merely giving such other dealers notices of the contract. It may be asked why is it, with all these legal facilities already available in nearly all the states, that pressure for Federal legislation should be exerted."

"What does the amendment do? It *permits* a man who manufacturers an article to state the minimum resale price of the article *in a contract with the man* who buys it for ultimate resale to the public, provided —and this 'provided' is mountain high—that the article about which the contract is written is in free and open competition with other articles. . . ."[88]

Senator Tydings was fully cognizant of Administration objections to the original Miller-Tydings bills. As introduced, S. 3822, S. 100, and H. R. 1611 would have legalized "contracts or agreements prescribing minimum prices *or other conditions*" for the resale of a commodity. The phrase "or other conditions" recalls the language of Justice Holmes' dissent in the *Dr. Miles* case, in which he excluded from consideration any "attempt to attach a contract or condition to the goods . . . or in any way to restrict dealings with them after they leave the hands of the [contracting] retailmen."[89] If this phrase had not been deleted, it might have been contended that these cryptic words authorized a restrictive condition or equitable covenant upon the use of the property.[90] Whatever may have been intended by the phrase, the effect of the deletion was to conform the Miller-Tydings Amendment, as enacted, with the Capper-Kelly bill and with the contract clause of a typical fair trade law.

The deletion of the phrase "or other condition" must be considered with another last minute amendment to the

[88] 81 Cong. Rec. 7495.
[89] 220 U. S. 373, 410-411 (1911).
[90] Chaffee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945 (1928); Beaudette and Berens, The Non-Signer Clause of Fair Trade Acts, 25 Notre Dame Law. 529, 541 (1950).

bill. This amendment added a proviso prohibiting horizontal resale price maintenance. The effect of these two changes is to preclude enforcement of resale price maintenance against non-signers.[91] According to Senator Tydings these changes *obviated the Administration's objections to the original bill.* His first statement was not explicit on the subject of the administration's objections but he did say:

> ". . . I should like to say that the amendment which I have just offered [the second proviso clause] has been worked out by certain administration leaders and myself and is entirely satisfactory to me; and I think I am authorized to say that with that amendment the administration is not now opposed. . . ."[92]

The Senator's second statement on the removal of administration objections is explicit. He said:

> "Originally . . . there was a message from the administration in opposition to this measure. I may say that I have been in consultation with the Attorney General's office, and the amendment I have offered was suggested by me and accepted by the Attorney General as curing the objections of the administration, and before I explain it briefly, I *think I am now in a position to say that* the original objections have been eliminated."[93]

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[91] This second proviso reads:

> *"Provided further,* that the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity, between manufacturers or between producers or between wholesalers or between retailers or between persons, firms, or corporations in competition with one another." 81 Cong. Rec. 7487.

[92] 81 Cong. Rec. 7487.

[93] *Id.*, at 7496.

On August 3, 1937, the conference report on H. R. 7472 was called up in the House. The report proposed that the House recede from its disagreement as to Title VIII which had been proposed as an amendment in the Senate committee. The House debate is of considerable interest.

The amendment of Title VIII bore the title "amendment 33" in the Conference Report, in which the House conferees recommended that the House recede from the disagreement on this amendment. The Conference Report contains the following statement on the part of the House conferees:

> "On amendment No. 33: This amendment to the antitrust laws under which *contracts or agreements* stipulating minimum resale prices of certain commodities, and which are similar to *contracts or agreements* which are lawful as applied to intrastate commerce, are not to be regarded as illegal under the antitrust laws. The House recedes."[94]

Making no reference to the non-signer clause and clearly restricting his interpretation of the bill to "contracts", Mr. Culkin stated:

> "The measure complements existing state law and *will make legal what was condemned by the Supreme Court in 1910 in the case of Dr. Miles Medical Co. v. Parks & Sons Co.*, (220 U. S. Rep. 373). The report of the proponent of the bill, Mr. Miller, calls attention to the opinion of Justice Sutherland [in the *Old Dearborn* case], upholding the constitutionality of the Illinois Price-Fixing Act. The House will be interested to know that such price-fixing acts supple-

[94] *Id.*, at 8137.

> mented by this legislation *will write into the law the minority opinion of Mr. Justice Holmes, filed in the Miles* case. Mr. Justice Holmes' language in this dissenting opinion was vigorous and incisive, and the principle laid down in his dissenting opinion is the genesis of this pending measure. . . ."[95]

Thus, Mr. Culkin, who, years before, had spoken on the Capper-Kelly bill, understood Title VIII of H. R. 7472 to permit only *contracts* fixing resale prices.

Representative McLaughlin did understand H. R. 1611, Mr. Miller's original bill, to incorporate the non-signer clause into federal law—perhaps because of the presence of the phrase "or other conditions" in H. R. 1611. He stated that adoption of the conference report would result

> ". . . in the enactment of the Miller-Tydings bill. That bill, H. R. 1611, has been acted on favorably by the Committee on the Judiciary and by the Rules Committee.
>
> "In these remarks, I shall refer to the Miller-Tydings amendment, which is included in the conference report, as H. R. 1611."[96]

But, *Mr. McLaughlin apparently was unaware that the phrase "or other conditions" contained in H. R. 1611 (and in S. 100) was deleted when S. 100 was substituted as Title VIII of H. R. 7472.* It might be assumed that since H. R. 1611 tracked section 1 of the typical fair trade act *except* for the phrase "or other conditions", this

[95] 81 Cong. Rec. 8139, 8140. Compare Mr. Culkin's statements quoted above on the Miller-Tydings bill with his statements on the Capper-Kelly bill. See footnote 28, *supra*. He envisages that the Miller-Tydings bill and the Capper-Kelly bill have the same purpose: to write into the law the *Dr. Miles* dissent.

[96] 81 Cong. Rec. 8140.

phrase might have had the purpose of incorporating federal sanction as to the non-signers covered in section 2 of the state fair trade acts. Deletion of the phrase from H. R. 1611 before incorporating that measure as Title VIII of H. R. 7472 is significant. The obvious significance, since the *deletion makes Title VIII conform almost exactly with Section 1, the contract provision, of the state acts,* is that the Committee desired specifically to limit Title VIII to exactly what it says—"contract or agreements relating to minimum prices".

Mr. McLaughlin's failure to note this deletion and his assumption of identity between H. R. 1611 and Title VIII of H. R. 7472 weakens considerably, to say the least, his statements regarding Title VIII. Assuming that his remarks could apply to H. R. 1611 or S. 100 as originally written, the remarks certainly cannot be applicable to Title VIII, in view of the deletion of the phrase "or other conditions". However, Mr. McLaughlin's remarks furnished one of the bases of decision in the only reported case examining the legislative history of the Miller-Tydings Act.[97]

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[97] Pepsodent Co. v. Krauss Co., 56 F. Supp. 922 (D. C. La. 1944), is the only reported decision, other than the decision in the Court of Appeals below, relating to the applicability of the Miller-Tydings Amendment to non-signers. The court did not consider the correlation existing between the Miller-Tydings Act and the Capper-Kelly bill, but restricted its examination of legislative history to the reports and debates of the Seventy-fifth Congress, and relied principally upon the statements of Mr. McLaughlin. After this rather restricted examination of legislative history, the court concluded:

"The history of the Amendment leaves no doubt that Congress enacted the Miller-Tydings Amendment with full knowledge of the provisions in State fair trade acts making resale price maintenance effective against non-contracting retailers."

This conclusion does not seem warranted, on the strength of statements by one or two members of Congress. However, even

In his discussion, Mr. McLaughlin made a statement wholly inconsistent with his later remarks concerning the non-signer clause.[98] He represented H. R. 1611 as a "permissive" act:

"H. R. 1611 . . . is entirely a *permissive* act. *It merely allows a seller and buyer of trade-*

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assuming the conclusion to be correct, it does not follow that the Miller-Tydings Act was intended to be applied to non-contracting retailers. It appears, instead, that Congress, with full knowledge of State fair trade laws, rejected the view that the Act should be made effective against non-contracting retailers.

[98] 81 Cong. Rec. 8142. Mr. McLaughlin's remarks on the non-signer were:

"House Bill 1611 is known as the Fair Trade Enabling Act because it is an act which enables fair-trade legislation passed by individual State legislatures to become effective and to be fully operative within the respective States. It is not legislation which puts into effect a new national policy originating in Congress. Rather it is legislation which helps the States to put into effect a policy originating within the States themselves. It constitutes a method through which States are enabled to enforce their laws through the cooperation of the Federal Government. It lends to the States the assistance of national legislation making effective fair-trade practice acts passed in the State legislatures. . . ."

"The State fair-trade practice acts in the respective States practically uniformly provide that any retailer selling a trade-marked commodity which comes within the provisions of act, knowing that the owner of the commodity has provided by contract that the article shall not be sold at less than a certain price, is bound by that contract although he may not be a party to it, and is liable for the penalties set up in the act against those who sell the trade-marked article at a price less than the price named as the selling price by the owner. . . .

"In the hearings before the committee and in the debates upon the bill in the committee itself, it was suggested that there are two points which may be considered in the nature of objections to the bill. The committee discussed these points and considered that they did not constitute valid objections. However, in order to present the matter fully to the House, these objections should be referred to. These objections are:

"First. That H. R. 1611, if enacted, would impose a penalty upon a seller of merchandise for selling such merchandise below the minimum price agreed upon in a contract to which he is not a party.

. . .

"The objections were overruled by the committee after a consideration of the testimony bearing upon them and after full discussion of the objections.

"The first objection, namely, that H. R. 1611, if enacted, will permit resale contracts to be binding upon parties other than the parties to the contract itself, is fully answered by the statement that the respective State laws make provision that the contract should be binding upon all those who sell the trade-marked article

marked or identified goods . . . to contract for resale of goods according to state law, if they want to do so. It does not compel the buyer and seller to enter a contract, but only authorizes them to do so, if they desire."

One might inquire as to the basically "permissive" nature of the Act. The non-contracting retailer who, under a state non-signer clause, may have had his rights bargained away by his competitor, in a contract to which he was not a party, would hardly consider the federal act "permissive" if it made a non-signer clause applicable to interstate transactions.

After further debate, the House adopted the Conference Report on H. R. 7472, including the recommendation of the House conferees to recede from disagreement on amendment No. 33—the Senate addition of Title VIII.[99] The bill was submitted to the Senate, which agreed to the Senate conferees recommendations on August 4, 1937. Thereafter H. R. 7472, as amended, was submitted to the President, who signed the bill on August 17, 1937.[100] Title VIII of H. R. 7472 became law, thereby amending the Sherman Act and Section 5 of the Federal Trade Commission Act.[101]

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which is the subject of the resale contract whenever the person selling the article below the contract resale price does so willfully and knowingly. This argument is well answered by the controlling opinion of the Supreme Court of the United States in the case of Old Dearborn against Seagram, supra, upholding the validity and constitutionality of the Illinois State Fair Trade Practice Act.

"Further complete answer to this objection is that the respective States in the exercise of their wisdom and judgment imposed the penalties provided in the respective State acts. The bill before us today, if enacted, merely makes effective the law which has been enacted by the respective State legislatures to govern transactions within their own borders."

[99] 81 Cong. Rec. 8143.
[100] *Id.*, at 8166.
[101] *Id.*, at 8477.

IV.

CONCLUSION.

The Miller-Tydings Act is closely linked with the original Stevens bill introduced in 1914, the Stephens bill of 1916, the Kelly and the Capper-Kelly bill introduced in each Congress from 1917 until 1933. All were motivated by the desire to remove the taint of illegality attached to resale price maintenance contracts by the *Dr. Miles* case. In the later bills, particularly the Capper-Kelly bill, explicit statements by the authors, by the Congressional committees considering these bills, and by many of the proponents of the bills, concede this purpose.

An hiatus exists from 1933 through 1935, during which no resale price maintenance bills were introduced in the Congress because resale price maintenance was permitted under the retail codes adopted pursuant to the N. R. A. On each side of the hiatus, however, substantially identical resale price maintenance legislation was proposed. The Capper-Kelly bill of the Seventy-First and Seventy-Second Congresses (Appendix C) is almost identical, word for word, with the Miller-Tydings Amendment as enacted (Appendix A). The necessary inference to be drawn from the similarity between the Capper-Kelly bill and the Miller-Tydings Amendment is that the latter was designed also to obviate the *Dr. Miles* decision and to write into the law the dissenting opinion in that case.

The Capper-Kelly bill, in addition to furnishing the basis for the Miller-Tydings Amendment at the federal level, also formed a basis for resale price maintenance bills adopted at the *state level.* The original state fair trade act, adopted in California in 1931, was based upon the Capper-Kelly bill. The California act has even been termed the "Junior Capper-Kelly Bill". This original California bill had no reference to non-signers, and no non-signer statutory provision appeared at the state level until the adoption in 1933 of the first non-signer clause. Such a provision has never appeared in any proposed federal legislation.

The basic facts in the legislative background of the Miller-Tydings Act are these:

(1) The Miller-Tydings Act is substantially identical in language and purpose with the Capper-Kelly bill drafted before the appearance of the first non-signer clause.

(2) The Capper-Kelly bill furnished the basis for the original California fair trade act (i.e., without the non-signer clause).

(3) The non-signer clause in state fair trade acts finds no basis in any proposed federal resale price maintenance bills, and furnished no basis for any such provision in the federal resale price maintenance legislation.

The legislative history proves beyond a doubt that the Miller-Tydings Amendment had a limited purpose: to except from the Sherman Act not all resale price maintenance—but only resale price maintenance by contracts, as permitted under the contract clause (Section 1) of a typical fair trade Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

JOHN MINOR WISDOM,
SAUL STONE,
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REPLY BRIEF FOR THE PETITIONERS

THE MILLER-TYDINGS AMENDMENT IS NOT ABSURD, FUTILE, OR INEFFECTIVE.

Petitioners contend that the Miller-Tydings Amendment means what it says: only contractual resale

price maintenance is permitted under the Sherman Act. The Government's position is the same:

> ". . . the Miller-Tydings Act means neither more nor less than what it says. By its terms, the Act removes the bar of the Sherman Act as to the specified voluntary contracts or agreements and does nothing more." (Brief of the United States, p. 18.)

Respondents argue that this construction would make the Amendment "absurd", "nugatory", "futile and ineffective", and that the Court should not adopt a construction which would make the Amendment "a futile and really absurd enactment . . . or useless or meaningless". (Respondents' brief, pp. 15-19.)

Certainly, compulsory resale price maintenance by notice would be an easy, convenient, and attractive scheme of price-fixing—for its beneficiaries. But it is not the only means of resale price maintenance and a Congressional enactment authorizing voluntary resale price maintenance by contract cannot be characterized as absurd, futile or meaningless.

The Amendment is necessary in order to authorize *voluntary* contracts fixing resale prices in transactions affecting interstate commerce. Without the Amendment such resale price maintenance by contract would be invalid under *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373 (1911) and other decisions. The traditional method of resale price maintenance was by contract. Although the Miller-Tydings Amendment is restricted to resale price

maintenance by contract only, the manufacturer still has at his disposal the means to maintain resale prices. "[Prior to the use of the non-signer clause] resale price maintenance rested entirely on contract and the producer's power to refuse to sell to those who would not comply." Shulman, *Fair Trade Acts*, 49 Yale L. Jour. 607, 618 (1940).

From the Stevens bill of 1914 to the last Capper-Kelly bill of 1933, all of the many resale price maintenance bills introduced in Congress proposed to sanction only voluntary resale price-fixing by contract. There is no doubt about this; the non-signer scheme was not devised until 1933. According to the respondents, all of this proposed federal legislation, promoted so persistently over such a long period of time, also would have been "absurd, futile, or meaningless". The National Association of Retail Druggists and several of the very corporations on whose behalf briefs have been filed in this litigation as *amici curiae* actively promoted these "futile" bills or were members of sponsoring associations. *FTC Report on Resale Price Maintenance* (1945), pp. 39-66.

Whether a statute has meaning or is "absurd and futile" should not depend on the extent of the trouble and inconvenience beneficiaries of the statute may be under in order to take advantage of the law. That Congress does not permit the method of price-fixing most convenient to manufacturers does not mean that the method permitted is futile. It is for Congress to determine the areas in which price-fixing will be al-

lowed in interstate commerce and to decide the terms under which price-fixing will be permitted, regardless of whether compliance with these terms may prove inconvenient.

A federal statute that would permit price-fixing to be imposed upon unwilling strangers to fair trade contracts would, of course, gratify manufacturers and producers of fair traded goods, but such a statute would be a radical departure from the principle of competition embodied in the Sherman Act.

Respondents seem to argue that a federal statute authorizing only contractual price-fixing either is futile or should be rewritten by the Court. Petitioners maintain that this statute is plain and unambiguous, and effective within the scope contemplated by Congress, and *should not be rewritten by the judiciary.*[1]

RESPONDENTS DO NOT ANSWER PETITIONERS' ARGUMENT THAT THE LANGUAGE OF THE MILLER-TYDINGS ACT IS THE LANGUAGE OF THE CAPPER-KELLY BILL DRAFTED AND INTRODUCED BEFORE THE NON-SIGNER SCHEME WAS EVER DEVISED.

Able briefs have been filed by the distinguished counsel for the respondents and their *amici curiae.*

---

[1] *Cf. 62 Cases, More or Less v. United States,* No. 363, decided March 26, 1951, 19 Law Week 4187, 4188, where the Court stated:

"... *our problem is to construe what Congress has written.* After all, Congress expresses its purpose by words. It is for us to ascertain, neither to add nor to subtract, neither to delete nor to distort." (Italics supplied.)

In none of these briefs is there an adequate answer to petitioners' argument that the language of the Miller-Tydings Amendment is derived from bills that were introduced over a long period of years before the Seventy-Fifth Congress adopted the Amendment and is virtually identical with the Capper-Kelly bill of 1929. The language of these earlier bills was drafted and the bills were introduced before the non-signer scheme was ever devised. *Petitioners ask: at what point did the language suddenly change its meaning?* As drafted and introduced the statutory language was intended to legalize only resale price maintenance contracts held invalid under the *Dr. Miles* case, 220 U. S. 373 (1911). If the Capper-Kelly bill had been enacted in 1929, before there was any non-signer clause, no one would have contended that its language, which is substantially identical with that of the Miller-Tydings Amendment, permitted the imposition of resale price-fixing on strangers to fair trade contracts.

Respondents discount the identity in language between the Capper-Kelly Bill and the Miller-Tydings Amendment, arguing that a difference in purpose between the two *gives to the same language a difference in meaning.* All of their purposes may not have been the same.[2] But to the extent that the purposes may be inferred from the plain language of the Capper-Kelly bill and the Miller-Tydings Amendment,[3] the purposes *were* the same. To the extent

[2] The Capper-Kelly bill was an independent statute; the Miller-Tydings bill was an amendment to the Sherman Act.

[3] The phrase "or other conditions" was removed from the Miller-Tydings bill before enactment, making the Act parallel the Capper-Kelly almost exactly. See petitioners' original brief, pp. 56-57, 83-92.

that both intended to authorize limited resale price maintenance in interstate commerce, the purposes were the same. And to the extent that both manifested an intention to limit the resale price maintenance to permissive contracts, the purposes were the same. And this is the crux of the case. Under neither bill is there any license for a scheme of compulsory price-fixing imposed on non-contracting parties. The identity of meaning and application is demonstrated by an identity of language, used for the identical purpose of authorizing limited resale price maintenance in interstate commerce.[4]

A Capper-Kelly bill actually did become law. In 1931 California enacted a "Junior Capper-Kelly Law", substantially identical with the Capper-Kelly bill introduced in Congress and, of course, substantially identical with the Miller-Tydings Amendment. But at the state level, in 1933, in order to reach non-signers, California found it necessary to amend the statute by adding the non-signer provision now found in all fair trade laws. The "Junior Capper-Kelly Law" of California was not broad enough to include non-signers at the *state level;* nor is its twin, the Miller-Tydings Amendment, broad enough to permit price-fixing against non-signers at the *federal level.*

[4] The Capper-Kelly bill and the Miller-Tydings Amendment are printed in parallel columns in petitioners' original brief, Appendix D, p. 65.

RESPONDENTS DO NOT ANSWER PETITIONERS' ARGUMENT THAT THE MILLER-TYDINGS AMENDMENT IS SECTION 1, THE CONTRACT CLAUSE, OF A TYPICAL FAIR TRADE LAW; IT IS NOT SECTION 2, THE NON-SIGNER CLAUSE.

Exhaustive briefs have been filed. But when all is said that can be said, one salient fact stands out. At the time Congress enacted the Miller-Tydings Amendment it had before it typical fair trade laws. Each contained two basic provisions: (1) the contract clause, and (2) the non-signer clause. *Congress saw fit to validate only the contract clause.* The Miller-Tydings Amendment, like the Capper-Kelly bill, parallels, word for word, Section 1, the contract provision of state fair trade acts. It has no reference whatever to Section 2, the non-signer clause. It would have been simple for Congress to have authorized resale price-fixing generally or to have taken some statutory cognizance of the non-signer clause. Congress decided otherwise. The language is clear and unambiguous. It can be taken only as a deliberate decision to sanction resale price maintenance by specified voluntary contract, but not to sanction a system of compulsory, uniform, price-fixing binding on unwilling strangers to fair trade contracts.

There is no adequate answer to this argument in any of the briefs by respondents or their *amici curiae.*

The attempted explanation offered by respondents is that a non-signer provision was unnecessary in the Miller-Tydings Amendment, since the cause of action against non-signers (liability in tort) is a product of the state's

exercise of its police power and is a state action to which the Sherman Act does not apply. In other words, respondents argue that action by the state in authorizing resale price-fixing to be imposed on non-signers and in creating a cause of action against non-signers is sufficient "state action" to insulate such price-fixing from the Sherman Act. By the same token, a state law authorizing resale price maintenance under a fair trade contract would also be "state action" and, under respondents' view, the Miller-Tydings Amendment would not have been necessary in the first place. The question of "state action" is dealt with in petitioners' brief (pp. 20-23) and is fully answered in the brief of the United States (pp. 7-10). It suffices here to say that the criterion of state action established in *Parker v. Brown*, 317 U. S. 341 (1943) and *United States v. Southeastern Underwriters Ass'n.*, 322 U. S. 533 (1944), is active participation by the state in the price-fixing or rate-making, not immunity for private price-fixing or encouragement to private restraints under an unsupervised, standardless statute.

Petitioners maintain that the Sherman Act is a positive declaration by Congress that there shall be competition in interstate commerce. Congress has preëmpted this field. Federal legislation, therefore, is necessary to except from the Sherman Act (1) resale price maintenance by contracts and agreements and (2) non-contractual resale price maintenance which eliminates price competition. Congress, following the Capper-Kelly bills and *all* prior bills on the subject, saw fit to sanction, in the Miller-Tydings Amendment, only specified voluntary contracts

and agreements which meet certain conditions, and nothing more.

Whatever promoters of price-fixing may have tried to obtain or thought that they obtained in the enactment of the Miller-Tydings Amendment, they did not get what they needed to force price-fixing under color of law on unwilling, non-contracting parties in transactions affecting interstate commerce.

CONCLUSION

For the reasons previously stated in petitioners' original brief and for the reasons stated herein, it is respectfully submitted that the judgment of the court below should be reversed.

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CERTIFICATE

This is to certify that copies of this brief have been served on opposing counsel on this ..... day of ....., 1951.

.....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL,
Petitioners,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL,
Petitioners,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

J. BLANC MONROE,
MONTE M. LEMANN,
WALTER J. SUTHON, JR.,
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HAUSER PRINTING CO., INC., NEW ORLEANS

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May It Please the Court:

BASIS OF DECISION BELOW

The decision below, enforcing resale price maintenance against a non-contracting retailer, is unquestionably fully in accordance with the applicable state law.[1]

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[1] *Pepsodent Co. and International Cellucotton Products Co. v. Krauss Co.*, 200 La. 959, 9 So. 2d 303 (1942); *Mennen Co. and Bristol-Meyers Co. v. Krauss Co.*, 134 F. 2d 348, 5 Cir. (1943).

Apart from the question now raised by petitioners under the Commerce Clause and the Miller-Tydings Amendment, it is settled that state statutory provisions of the character here in question do not violate any provision of the Constitution of the United States.[2]

The opinion sought to be reviewed herein, after referring to these decisions favorable on so many aspects to the validity of state fair trade acts, correctly says:

> "In this state of the law, proponents of, and protagonists for, the fullest scope for state fair trade statutes needed only the passage of a federal act relieving price maintenance contracts from the prohibitions of the Sherman Act. They did not need to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power, indeed in complete derogation of it, to do so. For the power to enact state fair trade laws derives not from the Congress, but from the inherent powers of the states." [3]

Petitioners ask this Court to construe the Miller-Tydings Amendment as creating a divided authority over the legal aspects of resale price maintenance within a state, such as Louisiana, having a typical fair trade act. Their contention is that, in such a locality, contracting resellers are governed by the provisions of the state fair trade act permitting resale price maintenance, while non-contracting resellers are subject to the asserted prohibitions of the Sherman Act in that field.

Upon this theory, two competing retailers in the

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[2] *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936), affirming 363 Ill. 559, 2 N.E. 2d 929, 363 Ill. 610, 2 N.E. 2d 940 (1936); see also the companion decision to the same effect, *The Pep Boys, Manny, Moe & Jack of California, Inc. v. Pyroil Sales Co., Inc.*, 299 U.S. 198 (1936), affirming 5 Cal. 2d 784, 55 Pac. 2d 194, 5 Cal. 2d 446, 55 Pac. 2d 177 (1936).

[3] 184 F. 2d at p. 15; Calvert R. 107; Seagram R. 101.

same neighborhood, functioning otherwise similarly as local outlets for the same goods of interstate origin, would be governed by different and diverse systems of law in the field of resale price maintenance if one had signed a resale price maintenance contract on a particular line of goods and the other had not done so. To attribute to the Miller-Tydings Amendment a result so out-of-balance would be inconsistent with the principle expressed in the following language in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949):

> "If possible, all sections of the Act must be reconciled so as to produce a symmetrical whole."

LEGISLATIVE HISTORY OF MILLER-TYDINGS AMENDMENT CLEARLY SUPPORTS DECISION BELOW

The decision sought to be reviewed is supported upon legislative history by the prior decision of Judge Borah in *Pepsodent Co. v. Krauss Co.*, 56 F. Supp. 922 (D.C. La., 1944). Petitioners concede[4] that this is the only other reported decision on this particular issue.

While both the majority and dissenting opinions in the present case express a refusal to consider legislative history, upon the view that the provisions of the Miller-Tydings Amendment are clear and unambiguous,[5] Judge Borah utilized a different approach in *Pepsodent Co. v. Krauss Co.* After fully reviewing the legislative history of the Miller-Tydings Amendment,[6] he stated as follows his conclusions as to Congressional intent derived from this source:

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[4] Petition, p. 6.

[5] 184 F. 2d at pp. 15, 16; Calvert R. 107, 109; Seagram R. 101, 103.

[6] 56 F. Supp. at pp. 924-927.

> "The history of the legislation leaves no doubt that Congress enacted the Miller-Tydings amendment with full knowledge of the provisions in state fair trade acts making resale price maintenance effective against non-contracting retailers, and that it was the design and intention of Congress to remove every obstacle which would hinder the free enforcement by the states of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit." [7]

Old Dearborn Distributing Co. v. Seagram-Distillers Corp.[8] and *The Pep Boys, Manny, Moe & Jack of California, Inc. v. Pyroil Sales Co.*,[9] upholding the constitutionality of the Illinois and California Fair Trade Acts, with especial emphasis upon the provisions for enforcing resale price maintenance against non-contracting resellers, were decided by this Court on December 7, 1936. This was well prior to the initial date (January 7, 1937)[10] in the sequence of significant legislative events in the progress of the Miller-Tydings Amendment towards enactment in August, 1937, as detailed by Judge Borah in his opinion in *Pepsodent Co. v. Krauss Co.* References to these decisions in both Houses of Congress appear in Judge Borah's analysis of this legislative history. Undoubtedly these then recent decisions, dealing primarily with state statutory resale price maintenance enforcement against non-signers, had a large part in the decision of Congress to turn over the subject of statutory resale price maintenance to the states through the enactment of the Miller-Tydings Amendment. We submit upon the following citations that Judge Borah correctly considered and gave weight to these legislative

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[7] 56 F. Supp. at p. 927.
[8] 299 U.S. 183.
[9] 299 U.S. 198.
[10] 56 F. Supp. at p. 924.

history materials in deciding this issue, and that the Court below in the present case could have correctly rested its decision upon that ground also:

United States v. American Trucking Associations, Inc., 310 U.S. 534, 543 (1940).

United States v. Dickerson, 310 U.S. 554, 562 (1940).

Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943).

Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 301 (1943).

CONTENTION OF PETITIONERS WOULD RENDER MILLER-TYDINGS AMENDMENT VIRTUALLY NUGATORY

The emphasis repeatedly placed by petitioners upon the phrase "contracts or agreements" in the Miller-Tydings Amendment, and upon the absence in that enactment of any specific mention of the so-called "non-signer" provision in state fair trade acts,[11] ignores the vital and essential interrelation between Sections 1 and 2 of the typical state fair trade act. The two provisions complement each other, and the statutory action for unfair competition under Section 2 against a price-cutting non-contracting retailer assures the contracting retailer that he will be protected against such unfair and destructive competition on the part of non-signers.

This vital interrelation between Sections 1 and 2 of the typical fair trade act was inferentially conceded by opposing counsel themselves, when they said in their

[11] Section 2.

brief in the Court of Appeals for the Fifth Circuit (p. 6):

> "It should be pointed out that a decision favorable to appellants will cripple, if it will not kill the Miller-Tydings Act. If the Miller-Tydings Act is limited, as the act itself says, to validating fair trade contracts but has no application to price-fixing imposed upon non-contracting parties, fair trade statutes will be deprived of effectiveness in transactions affecting interstate commerce."

The protective character of the action for unfair competition against the non-signer under Section 2, complementing the resale price maintenance contracts authorized by Section 1, was recognized by this Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* in the following language:

> "It is first to be observed that §2 reaches not the **mere** advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wifully* and *knowingly*. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it."
>
> * * * * *
>
> "Appellants [12] here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary

[12] Non-contracting retailers.

> acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under §2 of the law by which such acquisition was conditioned." [13]

The holding in the case just cited and quoted, that resale price maintenance under state fair trade acts is legally effective against non-signers, was thereafter repeatedly mentioned in the course of consideration by Congress of the legislation which became the Miller-Tydings Amendment; see the analysis of this legislative history material by Judge Borah in *Pepsodent Co. v. Krauss Co.*[14]

PARKER v. BROWN SUPPORTS DECISION BELOW

Parker v. Brown, 317 U.S. 341 (1943), cited in the brief of the Solicitor General,[15] in principle supports the decision now sought to be reviewed. This Court there held that the marketing program enforced by the California Agricultural Prorate Act did not clash with the prohibitions of the Sherman Act. We quote as follows from the opinion on that point:

> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47; and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co. v. United States*, 313 U.S. 450. Here the state command to the Commission and to the

[13] 299 U.S. at pp. 193-194.
[14] 56 F. Supp. at pp. 925 and 926.
[15] p. 3.

program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin v. Wallace*, 306 U.S. 1, 16; *Hampton & Co. v. United States*, 276 U.S. 304, 407; *Wickard v. Filburn*, ante, p. 111.

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen v. Smith*, 195 U.S. 332, 344-45; cf. *Lowenstein v. Evans*, 69 F. 908, 910." [16]

Similarly here, the State of Louisiana determined legislatively that, as a matter of its public policy, resale price maintenance contracts or agreements concerning trade-marked commodities should be legalized and that,

[16] 317 U.S. at pp. 351-352.

when some such commodity has been made the subject of such contracts, intentional price-cutting by a non-signer is an evil which should be prohibited. In *Parker v. Brown*, the prorate program was initiated by and had to be approved by the producers before it became effective, just as in the present case the producer of a trade-marked commodity must enter into resale price maintenance contracts before the state policy against non-signers, as expressed in its fair trade act, becomes effective. Just as in *Parker v. Brown*, it was the state which enforced the prorate program with penal and civil sanctions, so here it is the state acting through its judiciary which enforces the state's public policy as expressed in its fair trade act. No more private action and no less state action is involved here than was involved in *Parker v. Brown*.

In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*, 85 F. Supp 961 (D.C. Ark., 1949), the court held that the fixing of insurance rates by a Bureau of insurers, functioning under state statutory authority, did not violate the Sherman Act. We quote from that opinion as follows (p. 964):

> "The Sherman Act is not violated by acts authorized and regulated by state statute. *Parker, Director of Agriculture, et al v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315. There the court said: 'We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.' 317 U.S. at page 350, 351, 63 S. Ct. at page 313."

That case was affirmed on appeal under the same title in 181 F. 2d 175, 8 Cir. (1950), and the denial of

certiorari therein on Oct. 9, 1950, (No. 178 Oct. Term, 1950) is reported in 71 S. Ct. 56.

SHERMAN ACT EXPRESSLY AMENDED BY MILLER-TYDINGS AMENDMENT

The brief of the Solicitor General cites two decisions against restriction or limitation of the Sherman Act by implication from subsequent federal legislation. Neither of these decisions is at all apposite here. Both were cases in which the implication was sought to be drawn from subsequent independent legislation not in terms purporting to amend the Sherman Act.[17] The Miller-Tydings Amendment expressly amended Section 1 of the Sherman Act. The only purpose in amending the Sherman Act could have been to make some change therein. The legislative history of this amendment, as analyzed by Judge Borah,[18] clearly shows an intent to turn over to the state legislatures the handling of the whole problem of resale price maintenance on trade-marked commodities.

CONCLUSION

We urge, as grounds for denial of the certiorari application, the clear correctness of this decision, both (a) for the reasons stated in the majority opinion in the Court of Appeals for the Fifth Circuit herein and

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[17] In *United States v. Borden Co.*, 308 U.S. 188, 198-199, 203-206 (1939), it was argued unsuccessfully that the Agricultural Market Agreement Act of 1937 and the Copper-Volstead Act had impliedly repealed or restricted certain provisions of the Sherman Act. In *U. S. Alkali Export Association v. United States*, 325 U.S. 196, 206-211 (1945), it was unsuccessfully argued that the Webb-Pomerene Act had that effect.

[18] 56 F. Supp. at pp. 924-927.

(b) upon the legislative history analysis relied upon by Judge Borah in *Pepsodent Co. v. Krauss Co.*

Respectfully submitted,

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioners,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioners,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Calvert R. 102-112, Seagram R. 96-106) is reported in 184 F. 2d 11. The District Court filed no opinion, and entered injunctive decrees with supporting findings and conclusions (Calvert R. 80-91; Seagram R. 77-86).

JURISDICTION

The jurisdiction of this Court rests on 28 U. S. C. 1254 (1), and is not questioned.

STATUTES INVOLVED

The pertinent statutes are the Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, Sec. 1, 26 Stat. 209, 15 U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) and the Louisiana Fair Trade Act (La. Act 13 of 1936, La. R. S. 51:391-396). Section 1 of the Sherman Act in its original language and as amended is printed in parallel columns in Appendix A (pp. 79-81). The Louisiana Fair Trade Act is printed in Appendix B (pp. 82-83).

STATEMENT OF THE CASE

Calvert Distillers Corporation brought suit in the United States District Court for the Eastern District of Louisiana against petitioners (defendants below) to enjoin the latter from violating the provisions of the Louisiana Fair Trade Act by selling trade-marked brands of whiskey at prices below those fixed under contracts between Calvert and numerous other retail liquor dealers in Louisiana after the defendants had been notified of the prices so fixed (Calvert R. 2-13). Seagram-Distillers Corporation brought a similar suit against the same defendents (Seagram R. 2-13).

There was judgment in the District Court in each case for the plaintiff against the defendants (Calvert R. 80-91; Seagram R. 77-86). These judgments were affirmed by the Court of Appeals for the Fifth Circuit. A petition for writs of certiorari was granted by this Court on February 26, 1951.

The sole question in the case is whether the so-called non-signer provisions of the Louisiana Fair Trade Act [1] can be denied recognition in transactions affecting interstate commerce on the ground of conflict with the Sherman Act. The lower courts sustained respondents' contention that the Miller-Tydings Amendment exempts from the application of the Sherman Act the non-signer provisions of the State Fair Trade Acts.

The District Court, following the opinion of Judge Borah, in *Pepsodent Co. v. Krauss Co.*, 56 F. Supp. 922 (1944), made detailed findings [2] of the facts necessary to bring respondents' operations within the provisions of the Louisiana Fair Trade Act and the Miller-Tydings Amendment, including particularly a finding of the existence of free, fair and open competition between the products of each respondent and products of the same general class produced by others. The District Court also found that the petitioners had notice of the contracts by which respondents established the resale price of their products. The correctness of these findings is not challenged. The Court of Appeals for the Fifth Circuit affirmed the decision of the District Court.[3]

The provisions of the Louisiana Fair Trade Act are substantially identical with those of similar statutes en-

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[1] The constitutionality of this Act was upheld by the Supreme Court of Louisiana in *Pepsodent Co., and International Cellucotton Products Co. v. Krauss Co.*, 200 La. 959 (1942).

[2] Calvert R. 83-90; Seagram R. 79-85.

[3] In the lower courts the petitioners contended that the contract by which respondents fixed the resale prices of their products were invalid for want of mutuality. This contention was rejected by the lower courts and is no longer in the case.

In the lower courts respondents presented an alternative argument that the Sherman Act could in no event have any application to the retail transactions involved in this case because these were solely intrastate. We recognize that under recent decisions the weight of the argument is against us on this contention and we do not press it here.

acted in forty-five other states.[3a]

Specifically, the non-signer provisions of the Louisiana Fair Trade Act are *identical* with the corresponding provisions of the Fair Trade Act of Illinois which appear *verbatim* in the opinion of this Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S., 183 (1936), at page 186. In the cited case this Court upheld these provisions against an attack based on the Fourteenth Amendment.

As the decision in the *Old Dearborn* case did not discuss the possible application of the Sherman Act, in order to put at rest any questions which might arise based upon that Act, Congress in 1937 enacted the Miller-Tydings Amendment to the Sherman Act. It was generally understood that the purpose of Congress in enacting the Miller-Tydings Amendment was to give free rein to the policy of the states in this field and to eliminate any argument based upon supposed conflict with the Sherman Act.

While the Fair Trade Acts have been in operation for over fifteen years, there appear to be only two cases prior to the present cases in which it has been contended that their non-signer provisions are not within the Miller-Tydings Amendment. One of these cases is *Pepsodent Co. v. Krauss Co.*, 56 F. Supp. 922 (1944), cited *supra*, page 3. The other case is *Calamia v. Goldsmith Bros., Inc.*, 299 N.Y. 636, 795 (1949). Both of these decisions deny the contention now made by peti-

[3a] Only Missouri, Texas, Vermont and the District of Columbia have not enacted Fair Trade Acts. A list of the Fair Trade Acts of the various States will be found in 2 CCH Trade Regulation Service, § 7011 ff. The acts have been upheld in every State except Florida, and in that State a new act has recently been introduced in the legislature. For a list of the cases in which the various acts have been passed upon, see 2 CCH Trade Regulation Service, § 7128, listing the decisions of the courts of last resort of eleven States.

tioners. No appeal was taken from Judge Borah's decision in the *Pepsodent* case decided seven years ago and no appeal was taken to this Court from the decision of the Court of Appeals of New York in the *Calamia* case.[3b]

SUMMARY OF ARGUMENT

The Court of Appeals was right in finding, even without resort to legislative history, that the Miller-Tydings Amendment was "free from ambiguity", and that in

> "comprehensively and completely removing from the prohibitions of the Sherman Act *price maintenance contracts which are valid according to the law of a State*,[4] the amendment removed every prohibition from, or impediment in the way of, the enactment by the states of fair trade laws binding alike upon signers and non-signers."

The State Fair Trade Acts represent an exercise of State police power, which will be upheld even in fields which may affect interstate commerce, and will be superseded by federal action only in cases of direct conflict.

In matters of local concern, the reconciliation of the

[3b] There is now pending before this Court a petition (No. 538) for writs to review the decision of the Court of Appeals for the Third Circuit in a case involving the application of the Pennsylvania Fair Trade Act to sales made by a defendant conducting a mail order business and making shipments by mail or express to buyers outside the State. The Court of Appeals for the Third Circuit appears to have recognized the effectiveness of the Miller-Tydings Amendment to validate all transactions under State Fair Trade Acts, including non-signer provisions, when applied to sales made within the State. The case presented to the court was, however, distinguished on the ground that the transactions there involved were not limited to the State but involved shipments outside the State, to which the Court held that the State law could not apply. See *Sunbeam Corporation v. Wentling*, 185 Fed. 2d 903 (C.A. 3, 1950), reversing in part s.c. 91 F. Supp. 81.

[4] Emphasis by the Court of Appeals; Calvert R. 108, Seagram R. 102.

Emphasis generally throughout this brief is supplied by the authors of the brief unless it is otherwise specifically stated.

power of the States with that of Congress is to be attained by the accommodation of the competing demands of the State and national interests involved. The Miller-Tydings Amendment represents such an express accommodation.

The Court will not adopt a construction of a statute which makes the statute futile or which leads to absurd or unreasonable results.

The construction of the Miller-Tydings Amendment for which petitioners contend would make the Amendment futile and ineffective, in violation of the accepted principles of statutory construction. It was conceded by the petitioners in their argument in the lower Court that if the Miller-Tydings Amendment leaves the non-signer provisions of the State Fair Trade Acts unenforceable, those acts would be deprived of any effective operation. The dissenting judge of the Court of Appeals made a substantially similar concession.

The Miller-Tydings Amendment is not to be strictly construed. It is to be interpreted consistently with legislative intent and as an enabling act.

The Court is not concerned with the wisdom or policy of a statute. These are matters for the legislature.

Since its enactment, the Miller-Tydings Amendment has been generally construed as applying to non-signer provisions of State Fair Trade Acts. For that reason its repeal has been from time to time recommended, but Congress has never accepted the recommendation.

The legislative history of a statute should be examined, not only where doubts arise on the face of the statute as to its meaning, but also in cases where a

construction which might appear to be justified by the language of the statute would lead to absurd, futile or unreasonable results.

A detailed examination of the legislative history of the Miller-Tydings Amendment, including Committee reports and debates in Congress, demonstrates the clear intent of Congress to permit all aspects of statutory resale price maintenance to be governed by local law, and, accordingly, to remove the Sherman Act from any application to the consequences under State Fair Trade Acts of transactions within the State.

The Court of Appeals Was Right in Holding, Even Without Resort to Legislative History, That the Miller-Tydings Amendment Removed Every Prohibition From, or Impediment In the Way of, State Fair Trade Acts Binding Alike Upon Signers and Non-Signers.

The conclusion of the Court of Appeals was based upon the language of the Miller-Tydings Amendment, which relieves from the operation of the Sherman Anti-Trust Act contracts providing minimum resale prices where such contracts are lawful as applied to intrastate transactions and satisfy the other provisions of the Amendment.[5]

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[5] These other provisions specify that the contracts exempted are those covering the resale of commodities bearing the trademark, brand, or name of the producer or distributor which is in "free and open competition with commodities of the same general class produced or distributed by others." It is conceded that these conditions are met in the present case.

The Amendment further provides that it shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices "between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other." The cases thus enumerated as not entitled to the protection of the Amendment, commonly referred to as involving "horizontal" price fixing, are not here involved, these being cases of "vertical" price fixing.

Section 1 of the Sherman Act declares illegal only "every *contract, combination* or *conspiracy* * * *." When the Miller-Tydings Amendment removed from the impact of the Sherman Act contracts or agreements valid under State Fair Trade Acts, there was nothing left in the operation of the State Fair Trade Acts to which the Sherman Act could apply. The liability imposed by State law upon non-signers is a liability which the State law imposes as a consequence of the notice given them. Such liability is not within the purview of the Sherman Act. The liability of persons with notice does not depend upon any contract, combination or conspiracy. But the Sherman Act applies only to contracts, combinations or conspiracies.

When the contracts under State Fair Trade Acts were by the Amendment exempted from the operation of the Sherman Act, the State law was free to operate upon the consequences following from those contracts. As the Court of Appeals pointed out, a State needs no mandate from Congress for authority to enact legislation embodied in Fair Trade Acts. On this point the Court of Appeals said:

> "It is admitted, too, that it has been held in *Old Dearborn Distributing Co. v. Seagrams-Distillers Corp.*, 299 U.S. 183, 57 S. Ct. 139, 143, 81 L. Ed. 109, 106 A.L.R. 1476, that state statutes of this character do not violate any provision of the Constitution of the United States, though a fair trade agreement 'constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-Trust Act'.
>
> "In this state of the law, proponents of, and protagonists for, the fullest scope for state fair trade statutes needed only the passage of a fed-

> eral act relieving price maintenance contracts from the prohibitions of the Sherman Act. They did not need to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power, indeed in complete derogation of it, to do so. For the power to enact state fair trade laws derives not from the Congress, but from the inherent powers of the states." [6]

The statement of the Court of Appeals is fully supported by the decisions of State courts maintaining the validity of State Fair Trade Acts under the police power of the State. In upholding the Louisiana Fair Trade Act, and especially the non-signer provisions (Section 2), the Louisiana Supreme Court said in *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 979 (1942):

> * * * "Almost all of the courts are of the view, as will be disclosed by a reading of the above-quoted decisions, that an economic question is involved, and the statutes of this nature are a legitimate exercise of the police power."

The police power has been recognized as the source of State authority for the enactment of Fair Trade Acts in decisions of the courts of last resort of California and Illinois [7] upholding the Fair Trade Acts of those States, which were affirmed by this Court, as far as Federal questions were involved, in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936) and *Pep Boys v. Pyroil Sales Co.*, 299 U.S. 198 (1936).[8]

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[6] 184 F. 2d at pp. 14-15; Calvert R. 107, Seagram R. 101.

[7] *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446 (1936); *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, (1936).

[8] The police power of the State was relied upon in decisions maintaining an early New Jersey statute enacted in 1916 making prices established by makers of identified products binding upon all persons with notice, entirely apart from agreement. See *Ingersoll & Bros. v. Hahne & Co.*, 88 N.J. Eq. 222 (1917); s.c. 89 N.J. Eq, 332 (1918).

See also *Nebbia v. New York*, 291 U.S. 502 (1934), which also illustrates the extent of the police power of the state in its exercise, as here, in the field of price regulation:

> "* * * But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." (page 537)
>
> "* * * Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. * * *" (page 538)

The argument for petitioners ignores the vital and essential interrelation between Sections 1 and 2 of the typical State Fair Trade Act. The two provisions complement each other, and the statutory action for unfair competition under Section 2 against a price-cutting non-contracting retailer assures the contracting retailer that he will be protected against such unfair and destructive competition on the part of non-signers.

The protective character of the action for unfair competition against the non-signer under Section 2, complementing the resale price maintenance contracts authorized by Section 1, was recognized by this Court in the *Old Dearborn* case in the following language:

> "It is first to be observed that §2 reaches not the *mere*[9] advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wilfully and knowingly*.[9] We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling

[9] These italics are by the Court.

price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it.* * *"

"Appellants here acquired the commodity in question *with full knowledge of the then-existing restriction* in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. *Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under §2 of the law by which such acquisition was conditioned.*" [9]

In the *Old Dearborn* case, this Court outlined in the following language its recognition of the sabotaging effect of price-cutting by a non-signer upon resale price maintenance:

"* * * Appellant sold the products in question at cut prices—that is to say, at prices below those stipulated—and continued to do so after appellee's demand that it cease such practice. The result of such price cutting was a diminution of sales during the price-cutting period suffered by appellee and retailers other than appellant. Some dealers ceased to display the products, and notified appellee that they could not compete with appellant and would discontinue handling the products unless the price cutting was stopped." * * * [10]

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[9] 299 U.S. at pp. 193-194.

[10] 299 U.S. at p. 187. Appellant in the cited case had signed a contract, but questioned the authority of the executing official. This Court assumed the ineffectiveness of the contract and treated appellant as a non-signer.

Even in cases where Congress has not expressly acted (as it did by the enactment of the Miller-Tydings Amendment), it has been held that the Commerce Clause did not deprive the States of the power of legislation with respect to instruments of commerce so far as the legislation was within the ordinary police powers of the State (as the Court of Appeals in this case properly held the Fair Trade Acts to be). Compare *Louisville & Nashville Railway v. Kentucky*, 161 U.S. 677, 702 (1896):

> "* * * It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce so far as the legislation was within its ordinary police powers."

This rule was recognized and applied in *Kelly v. Washington*, 302 U. S. 1 (1937), where the Court said (page 10):

> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." (citing numerous cases.)

See also *Allen-Bradley Local v. Board*, 315 U. S. 740, 749 (1942), where the Court said:

> "Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 611, and cases cited; *Kelly v. Washington*, 302 U. S. 1, 10; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177; *H. P. Welch Co., v. New Hampshire*, 306 U. S. 79, 85; *Maurer v. Hamilton*, 309 U. S. 598, 614; *Watson v. Buck*, *supra*."

To the same effect are *People of State of California v. Zook*, 336 U. S. 725, 734 (1949); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company*, 335 U. S. 525 (1949).

In *Prudential Insurance Company v. Benjamin*, 328 U. S. 408, 433 (1946), in upholding a discriminatory State tax, the Court referred to

> "the decisions which, in every instance thus far not later overturned, have sustained coordinated action taken by Congress and the states in the regulation of commerce".

Parker v. Brown, 317 U. S. 341 (1943), does not support the position of the petitioners and the Government. We believe that in substance it supports the respondents. We make no claim that a State may itself give immunity to those who violate the Sherman Act. It is Congress which has given immunity from the Sherman Act to cases arising under State Fair Trade Acts. It is Congress which has indicated its view that the national interest is served by removing any impact of the Sherman Act from transactions under the State Fair Trade laws. In enacting the Miller-Tydings Amendment, Con-

gress evidenced its view that State regulation of the matters covered by the Fair Trade Acts should be sustained. In *Parker v. Brown* the marketing program established by the State was upheld, notwithstanding an impact upon interstate commerce, even in the absence of expressly validating Congressional action comparable to the Miller-Tydings Amendment. The Fair Trade laws of the States evidence a policy of the State as strong as an agricultural program.

In *Parker v. Brown* the Court thus stated the rule applicable in the present cases (p. 362):

> "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved."

In the present cases Congress has itself expressly provided for the accommodation of the competing demands of the state and national interests involved by enacting the Miller-Tydings Amendment.[10a]

[10a] *Hood & Sons v. Du Mond*, 336 U.S. 525 (1949), a five to four decision, cited by petitioners (p.23) and by the Government (p.9), is very distinguishable from this case because in the situation there presented there was no such evidence of the provision made by Congress for accommodation of the competing demands of the State and national interests as the Miller-Tydings Amendment affords in the present cases.

The Construction of the Miller-Tydings Amendment for Which Petitioners Contend Would Make The Amendment Futile and Ineffective, In Violation of Accepted Principles of Statutory Construction

It is conceded that if the Miller-Tydings Amendment is construed to exclude from its coverage cases arising under the non-signer provisions of the State Fair Acts, those acts become practically meaningless and ineffective.

This is the necessary result of the statement made by opposing counsel in their brief in the Court of Appeals, when they said (page 6):[10b]

> "It should be pointed out that a decision favorable to appellants will cripple, if it will not kill the Miller-Tydings Act. If the Miller-Tydings Act is limited, as the act itself says, to validating fair trade contracts but has no application to price-fixing imposed upon non-contracting parties, fair trade statutes will be deprived of effectivness in transactions affecting interstate commerce. * * *"

Since no Federal legislation was needed for full and unrestrained functioning of State Fair Trade Acts in transactions not affecting interstate commerce, this statement by opposing counsel is a plain admission that the statutory interpretation for which they contend would render the Miller-Tydings Amendment nugatory and futile in the only field in which it was intended to operate, and in which it was or may have been needed. Such an absurd result is contrary to accepted principles established by the decisions of this Court.

[10b] All paging references relating to contentions of opposing counsel denote pages in the brief for petitioners here, except when otherwise specified.

Substantially the same concession was made by the dissenting judge in the Court of Appeals when he said:

> * * * "It is recognized that in this time when the weight of interstate commerce affects multitudinous transactions, the construction here given the Miller-Tydings Amendment greatly circumscribes the relaxation of Federal control in the enforcement of State Fair Trade Acts. However, we should apply the statute as written." * * * [11]

Discussions of the Miller-Tydings Amendment in law review articles, some of which are cited by opposing counsel, confirm the view that the elimination of the non-signer provisions would deprive State Fair Trade Acts of their effectiveness for resale price maintenance. This is shown by the following quotations:

Boonstra, *State Fair Trade Acts and Supplementary Federal Legislation*, 47 Mich. L. Rev. 821, 829 (1949):

> "The success of the Fair Trade Acts is fundamentally dependent upon the 'non-signer' provision".

Callman, *"Fair Trade" and Anti-Trust Law*, 10 Univ. of Pitt. L. Rev. 443, 453 (1949):

> "It has been questioned whether the non-signers clause of the Fair Trade Acts is included in the exemptions of the Miller-Tydings Amendment. True, the phraseology of the amendment does not cover the clause, but a holding that it does not permit legal recourse against non-contracting price-cutters would render the amendment valueless. * * *"

51 Harvard Law Review, 336, 344 (1937):

> "It has been suggested that the Miller-Tydings Amendment further limits the seller and

[11] 184 F. 2d at p. 17; Calvert R. 111; Seagram R. 105.

gives him legal recourse only against a contractually bound price cutter, since it refers only to legalization of the price maintenance contracts themselves, and unlike most state legislation, fails expressly to mention price-cutting by those not parties to the contract."

"Since price maintenance is extremely difficult unless non-contractors with knowledge of the price restrictions are bound, this strict construction of the act would greatly impair its usefulness."

16 New York Univ. L. Quar. Rev. 113, 116-117 (1938):

"However, the Federal Act, modelled after the State Acts up to this point, lacks a corresponding provision binding non-contracting dealers by means of notice of price restrictions. This omission has raised a problem as to the legal status of non-contracting dealers engaged in interstate commerce. * * * Thus, if this constitutional objection is sustained and the provision of the state Fair Trade Acts binding non-contracting dealers is restricted to intrastate business, the combined State and Federal legislation will, in the bulk of transactions, afford but scanty protection to the owner of the goodwill. * * * In the light of these considerations, it is apparent that little, if anything, would remain of the whole protective structure of resale price maintenance legislation." [11a]

It being thus recognized that the construction for which the petitioners contend would make the Miller-Tydings Amendment a futile and really absurd enactment, the case is brought within the well settled rule,

[11a] After reviewing legislative history the author concludes that the Miller-Tydings Amendment clearly covers the non-signer provisions of the State Fair Trade Acts, saying "there is no real basis for * * * limiting the sphere of the applicability of * * * the Federal Act". For a fuller quotation, see *infra*, pp. 73-74.

that the Court will not adopt a construction of a statute which would make the statute ineffective or useless or meaningless.

In *Bird v. United States*, 187 U.S. 118, 124 (1902), a case frequently cited and followed on this point, this Court said:

> "* * * There is a presumption against a construction which would render a statute *ineffective or inefficient* or which would cause grave public injury or even inconvenience."

More recent expressions of this view by this Court are as follows:

Armstrong v. Nu-Enamel Corp., 305 U.S. 315, 332-333 (1938):

> "This Court has had several occasions within the last few years to construe statutes in which conflicts between reasonable intention and literal meaning occurred. We have refused to nullify statutes, however hard or unexpected the particular effect, where unambiguous language called for a logical and sensible result. Any other course would be properly condemned as judicial legislation. However, to construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is *susceptible of a construction which preserves the usefulness of the section*, the judicial duty rests upon this Court to give expression to the intendment of the law".

United States v. Powers, 307 U.S. 214, 217 (1939):

> * * * "The statute should not be so construed if another interpretation will make it *effective*."
> * * *

Sunshine Coal Co. v. Adkins, 310 U.S. 381, 392 (1940):

> • • • "That construction would read the 19½% tax out of the Act. The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a *construction* is *possible* which will *preserve* the *vitality* of the Act and the *utility* of the language in question." • • •

Gemsco, Inc. v. Walling, 324 U.S. 244, 258 (1945):

> • • • "What is 'incidental,' what 'independent' of stated statutory ends often presents a difficult issue. But that is seldom if ever true when *to deny* the authority or other feature questioned *would nullify the Act*, by reading out of its purview the only means for making it effective."

Miller-Tydings Amendment Is Not to Be Strictly Construed.

Opposing counsel seek to narrow the scope of the Miller-Tydings Amendment by invoking the doctrine of strict construction. The Solicitor General, in his memorandum supporting the certiorari application (pp. 6-7), also involves this doctrine of strict construction. He cites two decisions against restriction or limitation of the Sherman Act by *implication* from subsequent Federal legislation. Neither of these decisions is at all apposite here. Both were cases in which the implication was sought to be drawn from subsequent independent legislation not in terms expressly purporting to amend the Sherman Act.[12]

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[12] In *United States v. Borden Co.*, 308 U.S. 188, 198-199, 203-206 (1939), it was argued unsuccessfully that the Agricultural Market Agreement Act of 1937 and the Capper-Volstead Act had impliedly repealed or restricted certain provisions of the Sherman Act. In *U. S. Alkali Export Association v. United States*, 325 U.S. 196, 206-211 (1945), it was unsuccessfully argued that the Webb-Pomerene Act had that effect.

Counsel for petitioners (pp. 26-27) argue for a strict construction of the Miller-Tydings Amendment upon the authority of a quotation from Sutherland, *Statutory Construction* (3rd Ed. 1943), concerning the scope to be accorded to a "proviso" in a statute. However, a more extended quotation of the section quoted in part by our opponents shows the author to be in accord with the views which we express. This is indicated by the following further language of Mr. Sutherland in the cited section (4933):

> "As in all other cases, a proviso should be interpreted consistently with legislative intent. Where the proviso itself must be considered in an attempt to determine the intent of the legislature, it should be strictly construed. This is true because the legislative purpose set forth in the general enactment expresses the legislative policy and only those subjects expressly exempted should be freed from the operation of the statute. As the result of improper drafting, the 'provided, however' clause has been used to introduce new and unrelated material, and thus courts have held on some occasions that the words will be treated merely as introductory of new material."

As will be observed, legislative intent—the factor we stress—is given primary mention by the author. To the same effect is the comment of that same author at Section 4936 of his work:

> "The older rule strictly interpreted both exceptions and provisos but today exceptions and to some extent provisos are interpreted principally *in view of the legislative intent* and no presumption arises because of the form of the act that the interpretation must be strict."

Even where a "proviso" clause is to be interpreted,

the decisions of this Court do not attribute to the "proviso" the uniform requirement of strict construction for which opposing counsel contend. See *Springer v. Philippine Islands*, 277 U.S. 189, 207 (1928):

> * * * "It is difficult to assign to either proviso the general purpose of that form of legislation, which is merely to qualify the operation of the general language which preceeds it. We think rather that both provisos are to be construed as independent and substantive provisions. As this Court has more than once pointed out, it is not an uncommon practice in legislative proceedings to include independent pieces of legislation under the head of provisos. See *Georgia Banking Co. v. Smith*, 128 U.S. 174, 181; *White v. United States*, 191 U.S. 545, 551; *Cox v. Hart*, 260 U.S. 427, 435."

McDonald v. United States, 279 U.S. 12, 21 (1929):

> * * * "Little if any significance is to be given to the use of the word 'provided'. In Acts of Congress, that word is employed for many purposes. *Schlemmer v. Buffalo, Rochester, &c. Ry.*, 205 U.S. 1, 10." * * *

The Miller-Tydings Amendment is not subject to any rule of strict construction, but it should be recognized and given effect, in accordance with legislative intent, as being what one of its supporters denominated it in the debate on final passage in the House of Representatives—"a fair-trade enabling act." [13]

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[13] 81 Cong. Rec. p. 8140. See *infra*, p. 66.

United States v. Univis Lens Co., 316 U.S. 241 (1942); *United States v. Masonite Corporation*, 316 U.S. 265 (1942); *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944); and *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945), cited in opposing briefs, have no bearing on the present cases. They do not support a contention that the Miller-Tydings Amendment is to be construed nar-

(continued)

The Court Is Not Concerned With the Wisdom or Policy of a Statute. These Are Matters for the Legislature.

The argument presented in the brief of opposing counsel (pp. 11-12, 28-36) is to a large extent an attack on the economic desirability of the statutes involved. Such an argument goes to questions of legislative policy.[14] While opposing counsel are careful (p. 29) to disclaim any request to this Court to pass on the wisdom of the law, much of the material which they present is pertinent only to a legislative hearing on a repeal or amendment proposal.

The opinions of various writers as to the merits or demerits of the working of "Fair Trade" since 1937

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[13] continued:

rowly. The transactions involved in the cited cases were clearly outside the protection of the Miller-Tydings Amendment.

The *Masonite* and *Frankfort Distilleries* cases involved horizontal price fixing, expressly excluded by the Miller-Tydings Amendment from its protection.

The *Univis* case was a further processing case, not within the intent or language of the Miller-Tydings Amendment.

The *Bausch & Lomb* case denied the protection of the Miller-Tydings Amendment to certain contracts only because they "came into existence as a patch upon an illegal system of distribution", which had been established prior to the Amendment *(321 U.S. at p. 724)*.

In none of the cited cases did this Court enunciate or support any rule that the Miller-Tydings Amendment should be construed narrowly.

[14] There is much opinion entitled to great respect in favor of the social and economic principles, upon which the Fair Trade Acts proceed. See Brandeis, *"Cut Throat Prices—the Competition that Kills"*, Harper's Weekly, November 15, 1935. The views of Justice Brandeis are summarized in 57 Yale Law Journal 472, note 54, as follows:

> "Strong support was given to resale price maintenance by Brandeis who felt that preservation of the small retailer outweighed the advantages to be derived from the efficient monopolist. He was convinced that resale price maintenance would stamp out the price-cutting which led inevitably to monopoly and higher prices. One of his basic postulates, however, was that competition among manufacturers would result in a competitive fair price. Brandeis, *Business—A Profession* 243 (1914)."

See also the statement made by Governor Herbert H. Lehman in approving the New York Fair Trade Act, reported in New York Times of May 18, 1935.

can throw no light on the intent or purpose of Congress in enacting the Miller-Tydings Amendment in 1937. Certainly, under the "plain meaning" rule, which opposing counsel champion vigorously, the statutory language, or the meaning of that language, cannot be changed by views of various individuals concerning the merits of the statute, especially where such views are based upon events subsequent to enactment.

Of course, the groups most vitally interested in the maintenance of Fair Trade Laws, and doubtless largely responsible for the enactment of the Miller-Tydings Amendment, are the thousands of small merchants throughout the country who are engaged in an effort to maintain their existence against the competition of large organizations which can engage in price cutting. Whether it is more to the national interest to support these small merchants and retain them as a class in our business life or to permit consumers to get the benefit of cut prices, is a matter for Congress and the State legislatures, not for this Court.

We are confident that the Court will lay aside, as irrelevant on the issues of statutory meaning or interpretation, the arguments assailing these statutes on their merits. Compare the observations of Justice Harlan in *Northern Securities Co. v. United States*, 193 U.S. 197, 351-352 (1904):

> "Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and widespread financial ruin, it has been intimated, will follow the execution of its provisions. * * *
>
> "But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legis-

lative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the Court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restrain of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy * * *."

Also pertinent here is what was said on this subject in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 195 (1936):

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the cir-

cumstances here disclosed, is conclusive so far as this court is concerned."

Since its Enactment the Miller-Tydings Amendment Has Been Generally Construed as Applying to Non-Signer Provisions of State Fair Trade Acts.

We have heretofore referred to the circumstance that in the many years which elapsed from the date of the enactment of the Miller-Tydings Amendment in 1937 up to the filing of the cases now under review, only two cases have been presented to the courts in which it has been even contended (unsuccessfully) that the Miller-Tydings Amendment did not validate the non-signer provisions appearing in all State Fair Trade Acts.[15] During this considerable period of time there have been extensive operations under the State Fair Trade Acts which have affected the activities of large segments of the business community. During this period there has been substantial criticism of the policy which forty-five legislatures have seen fit to approve. Some of this criticism has included recommendations for the repeal of the Miller-Tydings Amendment. At least two former Assistant Attorneys General of the United States have made such a recommendation in behalf of the Department of Justice.[16]

Assistant Attorney General Thurman Arnold in expressing the view of the Department of Justice that the Miller-Tydings Amendment should be repealed, said in 1941:

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[15] See *supra*, pages 4-5.

[16] Address of Assistant Attorney General Bergson before the Association of the Bar of the City of New York, February 17, 1949, 4 Record of The Association of the Bar of the City of New York 115; Statement of Assistant Attorney General Thurman Arnold in a communication to the Temporary National Economic Commission, reported at pp. 18162-5, T.N.E.C. Hearings.

> "The power given by law *to coerce non-signers* to abide by the terms of resale price contracts, destroys competition among retailers as effectively as would an unlawful conspiracy." [17]

In a statement to the House of Representatives Committee on the Judiciary, Subcommittee on the Growth of Monopoly, Mr. John D. Clark, a member of the Council of Economic Advisers, evidenced his understanding that the Miller-Tydings Amendment had legalized action against non-signers under State statutes authorizing such action, saying:

> "The Miller-Tydings Act has amended the Sherman Act to permit business conduct, under the sanction of state laws, which unquestionably violates the principle of the original statute. Nearly every state has now enacted a statute to authorize manufacturers to fix a retail price which must not only be observed by retailers who contract to do so, but which, under some of the statutes, *must be observed by all retailers including those who have not been obliged to make such contracts.*" [20]

Mr. Clark suggested to the House Subcommittee that if its inquiry showed that results obtaining under trade practices were undesirable, the existing legislation should be revised. But it never has been.

The Temporary National Economic Committee in 1941 recommended that the Miller-Tydings Amendment be repealed.[20a]

Obviously there would be no occasion to recommend the repeal of the Miller-Tydings Amendment if it did not make enforceable the non-signer provisions of the

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[17] See T.N.E.C. hearings, pages 18162-5.

[20] See hearings of Subcommittee of Committee of Judiciary on the Study of Monopoly, House of Representatives, 81st Congress, First Session, Serial No. 14, Part 1, page 113.

[20a] T.N.E.C., *Investigation of Concentration of Economic Power, Final Report and Recommendations* 121 (1941).

State Fair Trade Acts, since if the Miller-Tydings Amendment did not have that effect, the purpose of the State Fair Trade Acts could not be accomplished and resale prices could not be maintained.

The Federal Trade Commission, which is the official public body entrusted with the supervision of trade practices, has consistently indicated its view that the non-signer provisions of the State Fair Trade Acts were by virtue of the Miller-Tydings Amendment enforceable in transactions affecting interstate commerce. In our review of legislative history, we have quoted from the letter of the Chairman of the Federal Trade Commission, which was transmitted by the President of the United States to Congress at the time that Congress had the Amendment under consideration, in which the Chairman expressly stated his understanding that the Amendment would make the non-signer provisions of the Fair Trade Acts "binding upon interstate commerce." [21]

Opposing counsel suggest (p. 82) that a quoted utterance of the Chairman of the Federal Trade Commission in October, 1937, shows an abandonment of his expressed view that the Miller-Tydings Amendment would make the non-signer provisions of State Acts effective in interstate commerce. What the Chairman then said could hardly be evidence of the purpose of legislation enacted two months previously. We dispute the meaning attributed by opposing counsel to the language which they quote but, be that as it may, the following other language used by the Chairman on that occasion, and quoted from the same source, completely destroys the theory advanced by opposing counsel:

> "Enactment of the Tydings-Miller bill was, of course, the culmination of a drive during which

[21] See the discussion, *infra*, pages 44-61, pointing out that Congress elected to enact the Miller-Tydings Amendment in the face of this admonition from the Chairman of the Federal Trade Commission.

> 42 State legislatures enacted price maintenance acts. In brief, the Federal Act does nothing more than *make lawful in interstate commerce* among 42 states *the practices which those states* already had made lawful in their intrastate commerce." [22]

At the time the Chairman of the Federal Trade Commission made the statement above quoted, there were pending before the Commission various proceedings against manufacturers of alcoholic liquors by which it was sought to have them desist from engaging in an alleged practice of imposing resale price maintenance upon all persons handling their products. Subsequently to the passage of the Miller-Tydings Amendment, the respondents in the proceedings before the Commission directed its attention to the enactment and thereupon the Commission entered orders reciting that in view of the Amendment it was closing the cases,[23] except as to what was done in the District of Columbia where there was no local Fair Trade Act. All of these orders were entered in 1938. It is obvious that the Federal Trade Commission would not have closed the cases as it did unless it had been of the view that the Miller-Tydings Amendment had authorized the enforcement of non-signer provisions under State Fair Trade Acts.[23a]

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[22] The Chairman's address as reported in 2 CCH Trade Regulation Service, § 7091.

[23] *Seagram-Distillers Corporation and Seagram-Distillers Corporation of Massachusetts*, 27 F.T.C. 106, 119-120 (1938); *Gooderham & Worts, Ltd., et al.*, 27 F.T.C. 123, 141-142 (1938); *Schenley Distillers Corp., et al.*, 27 F.T.C. 145, 159-160 (1938); *Hiram Walker, Inc., et al.*, 27 F.T.C. 162, 181-182 (1938); *National Distillers Products Corporation*, 27 F.T.C. 186, 208 (1938).

[23a] The Commission's action recognized the purpose and effect of the Miller-Tydings Amendment which are brought out in a monograph by Professor Edward H. Gault on Fair Trade in Michigan, 9 Michigan Business Studies, 1, 3:

> "Federal laws, in general, do not permit the owner of a trade-mark to control the resale price of his trade-marked merchandise. In order to avoid the danger of Federal illegality in the use of the state Fair Trade laws in interstate commerce, the Miller-Tydings Act was passed by Congress. The purpose of the act was to prevent Federal intervention in the use of the Fair Trade laws and avoid the dangers of interference by the Federal Trade Commission."

Further evidence of the construction placed upon the Act by the Federal Trade commission is to be found by its findings in *Eastman Kodak Co.*, 39 F.T.C. 154 (1944). In that case the Commission recognized the right to enforce non-signer provisions where the conditions of the Miller-Tydings Amendment were met.

The weight to be attached to the construction of the Miller-Tydings Amendment by the Federal Trade Commission and representatives of the Department of Justice is indicated by the language of this Court in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 246 (1951), where this Court said:

> "In addition, there has been widespread understanding that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor. This understanding is reflected in actions and statements of members and counsel of the Federal Trade Commission. Representatives of the Department of Justice have testified to the effectiveness and value of the defense under the Robinson-Patman Act. We see no reason to depart now from that interpretation."

In the light of the general understanding that the Miller-Tydings Amendment legalizes the State Fair Trade Acts and so makes possible effective retail price maintenance, the criticism of that practice by many writers (some of whom are quoted in the petitioners' brief [24]), and the recommendations which have been made

[24] For example, the articles published in Fortune in January and April, 1949, cited by petitioners in the footnote at page 15 of their brief, containing criticisms of the Fair Trade Acts, clearly indicate the understanding of the author and editor that the Miller-Tydings Act legalizes price maintenance as to non-signers; otherwise there would have been no occasion for the criticisms expressed in the article, since the alleged evils complained of would not exist.

for its repeal, one would expect that if the criticisms were well taken, Congress would have repealed the Miller-Tydings Amendment. *But Congress has never shown any sympathy for suggestions of repeal.* Various bills have been introduced to repeal the Amendment, but all of them have died in Committee, e.g., S. 204, 76th Congress, by Senator King; H. R. 3821, by Representative Fulmer, 77th Congress; H. R. 4003, 81st Congress, by Representative O'Toole.

The Court Should Examine the Legislative History of the Miller-Tydings Amendment.

Petitioners contend that the Miller-Tydings Amendment is clear and unambiguous, so that there should be no resort to legislative history. Nevertheless, petitioners undertake to review the legislative history in an effort to find in it support of their contention as to the meaning of the statute.

The cases generally state the rule to be that where a statute is plain and unambiguous and on its face evidences a meaning which, to use language employed by this Court, *does not lead to absurd or futile or unreasonable results*, no occasion arises to examine legislative history.[26] The present cases illustrate the difficulties

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[26] The law review articles and other authorities cited in petitioners' brief (pp. 38, 40) will upon a full reading, we believe, be found to indicate a view that legislative history may, and should be, resorted to in all cases of statutory construction; see *Jones, The Plain Meaning Rule and Extrinsic Aids in Interpretation of Federal Statutes*, 25 Wash. U. L. Q. at pages 11, 23-26 (1939); Horack, *Disintegration of Statutory Construction*, 24 Ind. L. Journal at page 341.

Sutherland, *Statutory Construction* (3d Ed. 1943) Section 4502:

> * * * Courts should not lose sight of the fact that statutory interpretation, whatever it may be called so far as the function of courts and juries is concerned, is a fact issue. Where available, the courts should never exclude relevant evidence on that issue of fact."

Compare Landis, *"A Note on 'Statutory Interpretation'"*, 43 Harvard Law Review, 886 at 892, (1930):

> "To ignore legislative processes and legislative history in the processes of interpretation is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our times."

which may arise in the application of the rule when the parties are in sharp disagreement as to the meaning of a statute. Sometimes only one of the parties contends that the statute is plain and the other contends that it is not. In the present cases we have the unusual situation where both parties contend that the statute is plain, but the meaning which each attributes to the statute is entirely opposed to the meaning attributed thereto by the other. In the present cases we have the added circumstance that the three Judges of the Court of Appeals who heard the cases below, while also agreeing that the statute was plain on its face, could not agree as to what its plain meaning was. Two of the Judges thought the plain meaning was that for which we contend; a dissenting Judge thought the plain meaning was entirely the opposite.

While we believe that the intent of the statute appears with sufficient plainness on its face in the sense which we attach to it, the circumstances above referred to make it impossible for us to feel that we would discharge our professional obligation if we did not fully develop the legislative history of the statute.[27] This Court has made constant use of legislative history material in recent years as a controlling basis in determining the meaning and effect of statutes. Such use has not been limited to cases in which the right to resort to such material was controverted. In many cases legislative history has been resorted to without any

[27] In *Pepsodent Co. v. Krauss Co., Ltd.*, 56 F. Supp. 922 (1944), which involves the same point as the instant cases, Judge Borah, then sitting in the District Court, resorted to the legislative history of the Miller-Tydings Amendment Act, and in his opinion fully reviewed that history. He concluded, as did the District Judge and the majority of the Court of Appeals in the instant cases, that the Amendment removed from the operation of the Sherman Act cases arising under the non-signer clause of the Fair Trade Acts. No appeal was taken from this decision.

discussion in the opinions as to the necessity for or propriety of such resort.[28]

The extensive use of legislative history by this Court in the interpretation of statutes is illustrated by Appendix A to the dissenting opinion of Mr. Justice Frankfurter in *Commissioner v. Estate of Church*, 335 U. S. 632 (1949). That appendix lists one hundred and thirty-three decisions of this Court, all rendered within the single preceding decade, in which legislative history was decisive of the construction of a statute. The recent opinions of the Court attest the continuance of this practice. We deem it sufficient to refer only to a few of the decisions of this Court which are especially applicable to the circumstances of the present case and the relevance of which we emphasize by a brief reference to our arguments and those of opposing counsel.

We have already adverted to the circumstance that while a majority of the Judges in the Court of Appeals considered the statute to have the plain meaning for which we contend, a dissenting Judge thought its plain meaning was the contrary. In this situation, even if the rule permitting resort to legislative

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[28] The practice of this Court is recognized in an article cited (page 38) by opposing counsel, Horack, *Disintegration of Statutory Construction*, 24 Ind. L. Jour., 335, 341 (1949), where the author says:

> "The use of extrinsic materials in the interpretation of statutes by the Supreme Court of the United States has been a standard practice. Fortunately it has seldom felt the necessity of defending their use by the repetition of formalistic rules of interpretation. Its opinions show that the meaning of the statute cannot come from the statutory words alone."

See Frankfurter, *Reading of Statutes*, 47 Columbia Law Review 527, 542-3 (1947);

> "When Mr. Justice Holmes came to the Court, the U. S. Reports were practically barren of references to legislative materials. These swarm in current volumes. And let me say in passing that the importance that such materials play in Supreme Court litigation carry far-reaching implications for bench and bar."

Cf. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 Am. Bar. Assn. Journal 535 (1948).

history were to be confined to cases where the statute was not plain and unambiguous, the Court may well resort to legislative history in reaching its decision. But the decisions show that resort to legislative history may be had even where the statute may be considered plain and unambiguous, if on its face it evidences a meaning leading to absurd, futile or unreasonable results. In the present case, as we have noted, opposing counsel themselves concede that a decision in their favor would make the Miller-Tydings Amendment entirely futile, and a similar concession was made by the dissenting Judge in the Court of Appeal.[29]. These concessions bring this case within the rule laid down by this Court in *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940), where the Court said:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile*[30] *results, however, this Court has looked beyond the words to the purpose of the act. Frequently however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.* When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination' ".

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[29] See *supra*, pages 15-16.

[30] For decisions of this Court that a statute will be so interpreted as to avoid an absurd or futile result, see *supra*, pp. 18-19.

In another decision handed down on the same day, this Court refused to apply the "plain meaning" rule and, predicating its decision on legislative history, said, *United States v. Dickerson*, 310 U. S. 554, 562 (1940):

> "The very legislative materials which respondent would exclude refute his assumption. *It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words.* Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co. v. United States*, *supra*, at p. 48. The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

In a later case, *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479 (1943), this Court said:

> "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination" '. *United States v. American Trucking Assns.*, 310 U. S. 534, 543-44. See also *United States v. Dickerson*, 310 U. S. 554, 562."

In the light of the quoted language, it is difficult to support a contention that the legislative history of the Miller-Tydings Amendment should not be examined, even if it could be said that its plain language on its face led to the result for which the petitioners contend.

Petitioners argue that significance is to be attached to the failure of the Miller-Tydings Amendment to expressly refer to the non-signer provisions of the Fair Trade Acts. This Court has specifically held that in weighing contentions of this character, legislative history will afford a guide. Thus, in *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943), the Court resorted to legislative history in determining whether there was a right to judicial review of a decision of the National Mediation Board. That Board was created by the Railway Labor Act, which nowhere mentions judicial review of the Board's decisions. In considering the legislative history, the Court said (p. 301):

> "Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied."

We contend, and our opponents deny, that the general purpose of the Miller-Tydings Amendment was to turn over to the respective States the entire subject of vertical resale price maintenance (as applying to identified commodities selling in free and open competition), and to liberate all provisions of local statutes on that subject from any possible claim that these statutes ran afoul of interstate commerce regulations.[31] In weighing the opposing arguments the Court will find evidence of the intention of Congress in the congressional debates. In so doing, the Court will follow the rule which it stated in *United States v. San Francisco*, 310 U.S. 16 (1940), footnote 10, page 22:

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[31] See *infra*, pages 75-78.

> "Reference to congressional debates may be made to establish a common agreement upon the general purpose of an Act. *Standard Oil Co. v. United States*, 221 U.S. 1, 50; *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 650; *Humphrey's Executor v. United States*, 295 U.S. 602, 625."

The reports and debates on the Miller-Tydings Amendment make frequent references[32] to the then recent decision of this Court in the *Old Dearborn* case, 299 U.S. 183, in which this Court specifically upheld the non-signer provisions of State Fair Trade Acts. These references to this decision in the processes of the enactment of the Miller-Tydings Amendment are significant in resolving the problem of statutory interpretation; see *Overstreet v. North Shore Corp.*, 318 U.S. 125, 131-132 (1943):

> "* * * We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the Pedersen and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, *especially when Congress* in adopting the phrase 'engaged in commerce' *had those Federal Employers' Liability Act cases brought to its attention.*"

This language is also directly applicable to the circumstance that, in the consideration of the Miller-Tydings Amendment, the attention of Congress was particularly directed to a communication from the President of the United States, enclosing a letter from the Chairman of the Federal Trade Commission, in which the latter indicated his view that the Miller-Tydings Amendment would make the non-signer provisions of State Fair Trade Acts binding in cases arising in interstate com-

[32] See *infra*, pages 39, 42, 45, 48, 50, 55, 56, 60-61.

merce cases.[33]

The decisions of this Court chiefly relied upon by opposing counsel[34] as a bar to any consideration of legislative history here, are insufficient to overcome the weight and effect of the decisions to which we have referred. None of the cases cited by opposing counsel presented a situation comparable to this case. In none of them did two judges find language to mean one thing, while a third judge found it to mean the reverse. In none of them did the interpretation adopted lead to "absurd or futile" or "unreasonable" results or results "plainly at variance with the policy of the legislation as a whole."[35]

We proceed now to a detailed review of the legislative history of the Miller-Tydings Amendment.

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[33] This letter was frequently incorporated in the legislative record: 81 Cong. Rec. p. 7490; S. Doc. No. 58, pp. 2-3, 75th Cong., 1st Sess.; S. Rep. No. 879, Part 2, pages 3-4; see *infra*, pages 44, 47, 48, 49.

[34] In *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945), this Court actually considered legislative history and found it did not sustain the argument predicated upon it, saying (p. 260):

> "* * * The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." * * *

In *Ex Parte Collett*, 337 U.S. 55 (1949), this Court considered legislative history to the extent of a ten-page analysis (pp. 61-71) and arrived therefrom at the same conclusion as derived from the statutory language itself.

In *Packard Motor Car Co. v. N. L. R. B.*, 330 U.S. 485 (1947), four out of nine Justices dissented on the ground, *inter alia*, that legislative history should have been considered and would have aided in producing a different outcome.

In *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932), a substantial minority of the Court specially concurred (p. 85) in the result on the ground that it was supported by the legislative history which the majority had declined to consider.

Caminetti v. United States, 242 U.S. 470 (1916), was cited in the opinion of this Court in *United States v. American Trucking Assn.*, *supra* (310 U.S. 534, 543), and evidently considered by the Court to be entirely consistent with the rule there laid down, that a statute will not be construed so as to lead to absurd, futile or unreasonable results, even though the language of the statute on its face might appear plain.

[35] See quotation from *United States v. American Trucking Assn.*, *supra*, p. 33.

The Legislative History of the Miller-Tydings Amendment Demonstrates the Clear Intent of Congress to Permit All Aspects of Statutory Resale Price Maintenance to Be Governed By Local Law.

Since the Court below, deciding in our favor on other grounds, declined to consider this point, legislative history is not discussed or appraised in the opinion under review.

The only reported decision dealing with this particular legislative history problem is *Pepsodent Co. v. Krauss Co.*, 56 F. Supp. 922 (D.C. La., 1944). The issue raised there was identical with the issue here involved. Judge Borah, after reviewing the legislative history of the Miller-Tydings Amendment in some detail, ruled in favor of the contention which we make here and succinctly stated his reasons for this conclusion as follows (p. 927):

> "The history of the legislation leaves *no doubt* that Congress enacted the Miller-Tydings amendment with *full knowledge* of the *provisions* in state fair trade acts making resale price maintenance effective *against non-contracting retailers*, and that it was the *design and intention of Congress to remove every obstacle* which would hinder the free enforcement *by the states* of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit."

We now present a review in full detail of the legislative history to the end of demonstrating the clear correctness of Judge Borah's conclusion. We emphasize in this review what Judge Borah emphasized—(1) *Congressional knowledge* of state statutory provisions making resale price maintenance *effective against non-signers*

and (2) *Congressional intent* to give *full scope to local statutes* in the field of resale price maintenance.

Introduction of H. R. 1611 and S. 100.

The final chapter in the legislative history of the Miller-Tydings Amendment commences with the introduction of bills of substantially identical text (H. R. 1611 [36] and S. 100 [37]) early in the First Session of the 75th Congress. The fruition of the introduction of these bills [38] was the *enactment of the Miller-Tydings Amendment* as Title VIII of H. R. 7472 several months later in that same session.

These bills were introduced just about *one month after this Court*, on December 7, 1936, had *upheld the constitutionality of the Illinois and California Fair Trade Acts.*[39] These State acts provided that contracts fixing a minimum price on identified commodities should be *enforcible*, as a matter of State law (based upon State views of unfair competition) *against non-contracting resellers on notice* thereof. As will be demonstrated hereinafter, the progress of the legislative proposals in Congress to enactment was accompanied by a number of references to these *"non-signer"* provisions in State Fair Trade Acts and to the decisions of this Court upholding the validity of such statutes, including these particular provisions.

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[36] Introduced by Representative Miller January 5, 1937; 81 Cong. Rec. p. 34.

[37] Introduced by Senator Tydings January 6, 1937; 81 Cong. Rec. p. 66.

[38] Petitioners find significance in unenacted legislative proposals on this subject in prior sessions of Congress. We differ with petitioners as to the weight to be accorded to the course of these earlier legislative proposals, which we discuss hereinafter; see *supra*, pp. 62, 64, 75-78.

[39] *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183 (1936); *Pep Boys v. Pyroil Sales Co.*, 299 U. S. 198 (1936).

Senate Committee Report on S. 100.

This bill, upon introduction, was referred to the Senate Judiciary Committee.[40] On March 29, 1937, it was reported favorably with amendments which do not throw any light on the present problem.[41] The Committee report quotes the report made at the previous session on S. 3822.[42] While that report did not specifically mention the non-signer provisions in the State Fair Trade Acts or the then recent decision of this Court upholding their constitutionality, those subjects were placed before the Senate fully at other stages of this legislative proposal.[43]

The report on S. 3822 did contain the following recitals of an intent to give full scope to State legislation in each locality:

> "The Congress is not called upon to pass upon the effectiveness of the remedy, but *it should not put obstacles in the way of efforts of the individual States to make the remedy effective.*" * * *
>
> "But most important, from the standpoint of

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[40] 81 Cong. Rec. p. 66.

[41] 81 Cong. Rec. p. 2802; S. Rep. No. 257, 75th Congress, 1st Session.

[42] S. 3822 was introduced in the 74th Congress, 2nd Session, by Senator Tydings. While differing somewhat in wording from H. R. 1611 and S. 100, it was intended to accomplish the same substantial result; see *infra*, page 62. It was passed by the Senate without amendment and referred to the House Judiciary Committee, but Congress adjourned before further action was taken. See 80 Cong. Rec. p. 8433.

The Senate report on S. 3822 will be found in S. Rep. No. 2053, 74th Cong., 2nd Sess. This report is also again quoted in the Senate Committee report on Title VIII, H. R. 7472, 75th Congress, 1st Session, which embodied the Miller-Tydings Amendment as finally enacted; see S. Rep. No. 879, Part 1, 75th Cong., 1st Sess., *infra*, pages 47-48.

[43] This frequently used Committee report significantly mentions "loss-leader" selling as the practice against which the proposed legislation was directed. We point out elsewhere (*infra*, p. 63, footnote 100) the significance of this concept of the legislative aim as indicating an intent that this Federal enabling legislation should extend to making operative the non-signer provisions of the State laws.

Congress, the proposed bill merely *permits the individual states to function, without Federal restraint*, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the state laws.

"In other words, the bill does no more than to remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful."

House Committee Report on H. R. 1611

This bill, upon introduction, was referred to the House Judiciary Committee.[44] On March 11, 1937,[45] it was reported favorably with amendments not important in the present controversy. The Committee report on this bill[46] *demonstrates both Congressional knowledge of the non-signer provisions* in State Fair Trade Acts and *Congressional intent to give the fullest scope to State policy* as embodied in those State statutes. This appears from the following statements on page 2 of the report:

"GENERAL STATEMENT

"The *sole objective* of this proposed legislation is to *permit the public policy*[47] *of States having 'fair trade acts' to operate* with respect to interstate contracts for the resale of goods within these States. The fair-trade acts referred to legalize the maintenance, by contract, of resale prices of branded or trade-marked goods which are in free competition with other goods of the same general class. * * *

[44] 81 Cong. Rec. p. 34.

[45] 81 Cong. Rec. p. 2133.

[46] H. R. Rep. No. 382, Part 1, 75th Cong. 1st Sess.

[47] As the description and analysis of these State Acts later in the report shows, the "public policy" of these States with respect to such "contracts" clearly included making the minimum prices set up by such contracts effective against non-signers on notice.

"STATE FAIR TRADE ACTS

"State fair trade acts *typically provide*, first, that contracts may lawfully be made which provide for maintenance by contract of resale prices of branded or trademarked competitive goods. *Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.*

"The pertinent provisions of the Illinois Act, recently held constitutional by the Supreme Court in the case of *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation* (decided December 7, 1936) read as follows:

"'Section 1 * * *'[48]

"'Sec. 2. Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this Act, *whether the person so advertising, offering for sale, or selling is or is not a party to such contract*, is unfair competition and is actionable as such at the suit of any person damaged thereby."[49]

The report then lists the twenty-eight states which up to that time had adopted Fair Trade Acts, and also lists other states where such a legislative proposal was pending in various stages.

Under the heading "ECONOMIC ASPECTS", the report recites (p. 3):

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[48] The report at this point embodies *verbatim* the language of Section 1 of the Illinois Fair Trade Act as set out in the opinion of this Court in *Old Dearborn Distributing Company vs Seagram-Distillers Corporation* 299 U.S. 183, at pp. 185-6. It is typical Section 1 language in the Fair Trade Acts.

[49] This language is also copied *verbatim* in the Committee report from the statement of this Court in the *Old Dearborn* case. The language of the Illinois Act thus quoted is *identical* with the corresponding provisions of other Fair Trade Acts, including the Louisiana and California Acts. See *Pep Boys v. Pyroil Sales Co.*, 299 U.S. 198 (1936).

"However, in the opinion of the committee, those arguments are more properly addressed to the State legislatures considering the enactment of fair trade acts. It is the legislature's responsibility to fix the public policy of the State. *This legislation merely seeks to help effectuate a public policy so fixed in a State.* It has no application to any State which does not see fit to enact a fair trade act."

The report concludes as follows (pp. 3-4):

"EFFECTUATION OF STATE PUBLIC POLICY

"Your committee respectfully submits that sound public policy on the part of the Federal Government lies in the direction of *lending assistance to the States to effectuate their own public policy with regard to their internal affairs.* It is submitted that this is especially true where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of the power over interstate commerce by the States to the Federal Government."

Representative Celler, joined by Representative Ramsey, filed a supplemental report, criticising the background of the legislative proposal in some respects, but expressing an intent to vote for the bill.[50] This supplemental report contains the following *specific reference to the non-signer provisions in these State Acts* (p. 24):

"It must be kept in mind that the Supreme Court in upholding two State laws of the type H. R. 1611 is intended to facilitate, did not sustain price fixing as an end. The Supreme Court merely *upheld price-fixing contracts involving trade-marked articles in open competition, as binding on all (on notice as to their existence)*, as a means to the end of protecting intangible rights in the trade marks from destructive selling. * * *"

[50] H. R. Rep. No. 382, part 2, 75th Cong., 1st Sess.

Transmittal to Senate by the President of Letter from Chairman of Federal Trade Commission

On April 24, 1937, President Roosevelt addressed a communication to the President of the Senate, urging that consideration of this proposed legislation be deferred "until the whole matter can be more fully explored." [51]

Attached to this communication was a letter addressed to the President by the Chairman of the Federal Trade Commission,[52] which is of major significance in this legislative history. *That letter categorically states that the pending legislation would make the non-signer provision of State Fair Trade Acts "binding upon interstate commerce."*

The letter from the President read in part as follows:

> "* * * I requested the Chairman of the Federal Trade Commission to give me a *recommendation* on this bill, and I *attach his reply* on behalf of the Commission." [53]

In the communication from the Chairman of the Federal Trade Commission thus transmitted to Congress by the President the following pertinent and important language appears.

> "The Tydings-Miller bill would amend the anti-trust laws so as to legalize contracts and agreements fixing minimum resale prices for goods sold in interstate commerce and resold within the jurisdiction of any State where such contracts or agreements as to intrastate commerce have been legal-

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[51] 81 Cong. Rec. p. 3838. This letter was received and read in the Senate on April 27, 1937, and with the accompanying papers was ordered printed. They were thereupon printed as S. Doc. No. 58, 75th Cong., 1st Sess.

[52] S. Doc. No. 58, 75th Cong., 1st Sess., pp. 2-3.

[53] S. Doc. No. 58, 75th Cong., 1st Sess., p. 1.

ized. *A number of States now have such statutes.*

"Many of these State laws and the Tydings-Miller bill are *directly and irreconcilably in conflict with the present Federal law* on resale price maintenance. Public policy since the passage of the Sherman Antitrust Act in 1890 has been opposed to resale price maintenance. Numerous court decrees have been entered under the Sherman Act and numerous orders to cease and desist have been issued by this Commission and affirmed by the courts in conformity with the public policy expressed in the Sherman Act and in the Federal Trade Commission Act. Enactment of the Tydings-Miller bill would in its practical effect void such decrees and orders and constitute a reversal of what has been public policy for many years.

"*Since State laws* legalizing resale price maintenance *differ* in the various States, and since under the proposed Federal legislation Federal exemption from the antitrust laws would be conditioned upon the legality of similar contracts in intrastate transactions, the Tydings-Miller bill *would modify the antitrust laws in differing degrees in different states.* Thus, not only would it leave the Federal antitrust laws in full force and effect as to those States which do not legalize resale price maintenance, but there would be *divergent policies as to those States which legalize resale price maintenance, because of the differing terms of the different statutes in the respective States.* Thus, the Federal Government would be under the necessity of attempting to enforce divergent regulatory policies toward shipments made by the same manufacturer to dealers located in different States, because of the differences in the respective State statutes

"A *peculiar feature* of many of the State laws *which would, under a recent decision of the Supreme Court,* speaking through Mr. Justice Sutherland (57 S. Ct. 147), *thus be made binding*

> *upon interstate commerce* is that they *require wholesalers and retailers to conform* to the provisions of private resale price maintenance contracts *to which they are not parties.* Thus a private contract, the provisions of which are determined without public hearing and apart from any public supervision as to reasonableness, is made binding upon *all* dealers *and* the consuming public." [54]

The letter of the President transmitting these observations itself quoted the following significant language contained in the communication from the Chairman of the Federal Trade Commission:

> "* * * Indeed, the Commission says: 'There is great probability that manufacturers and dealers may abuse the *power to arbitrarily fix resale prices* by unduly increasing prices, resulting in bitter resentment on the part of the consuming public, especially in this period of rising prices.'" [55]

All of this language in the communication from the Chairman of the Federal Trade Commission, which was particularly directed to the attention of Congress by the President, is consistent only with an understanding that the legislation contemplated a system of resale-price maintenance *effective, wherever local laws so provided, against non-signers* as well as against those resellers voluntarily entering into resale price maintenance agreements. The language is to be read in the light of the fact that the Chairman of the Federal Trade Commission had had direct contact with the progress of the legislative proposal and was especially informed on the subject. He and the General Counsel of the Commission had attended, on invitation, a meeting of the House Judiciary Committee

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[54] S. Doc. No. 58, 75th Cong., 1st Sess., pp. 2-3.
[55] S. Doc. No. 58, 75th Cong., 1st Sess., pp. 1, 3.

for a discussion of H. R. 1611.[56]

The use made of the President's letter and the communication from the Chairman of the Federal Trade Commission therewith enclosed, by Senator King, the leading opponent of this legislative proposal in the Senate, is detailed hereinafter.[57]

Senate Committee Report on H. R. 7472.

H. R. 7472 was a bill providing additional revenue for the District of Columbia. When this bill reached the Senate and was considered by the Committee on the District of Columbia, it was the subject of a *committee amendment incorporating therein as Title VIII the substance of S. 100 and H. R. 1611.* The Committee, by a vote of 11 to 1, then reported this bill *favorably with this amendment.*[58]

The majority report described Title VIII as follows:

> "Title VIII of this bill, as reported by your committee, includes a provision amending the anti-trust laws which *incorporates the provisions of S. 100,* which was reported from the Committee on the Judiciary on March 29, 1937. In reporting S. 100 the Committee on the Judiciary incorporated a report on a similar bill (S. 3822) which was made during the Seventy-fourth Congress. That report which is also applicable to S. 100 and Title VIII of this bill, is as follows." [59]

The report then reproduces what was said by the

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[56] 81 Cong. Rec. p. 8140.

[57] The first use of this material by Senator King was to employ it as the basis for deferring action on S. 100 when it was to come up for consideration on May 3, 1937; 81 Cong. Rec. pp. 4083-4084.

[58] S. Rep. No. 879, part 1, 75th Cong., 1st Sess. This report also included other amendments to portions of the bill not relating to resale price maintenance.

[59] S. Rep. No. 879, 75th Cong., 1st Sess., part 1 p. 5.

report on S. 100,[60] which in turn is a reproduction of the committee report on S. 3822 at the preceding session.[61]

Senator King, in a *minority report*,[62] vigorously opposed Title VIII of H. R. 7472. In his report he quoted in full the letter from the President and the attached communication from the Chairman of the Federal Trade Commission [63] expressing the view that the pending legislative proposal would make the *non-signer* provisions in State Fair Trade Acts *"binding upon interstate commerce"*. He added his own expression of views on that particular subject as follows:

> "And it should not be forgotten that these price contracts are not necessarily made with each wholesaler or retailer who resells the goods. The Supreme Court has always *held valid*, in the California and Illinois cases, the section in these State laws that allows the manufacturer or wholesaler by having only one contract in the State to force his fixed price on other dealers within the State by *merely giving such other dealers notices of the contracts* * * * ".[64]

Senator King's minority report was followed by a vigorous fight on his part on the Senate floor against this legislative proposal. There again he *fully presented* the point that the effect of the proposed legislation was to *embrace and make operative the non-signer provisions* in State Fair Trade Acts.[65]

Senate Action on Title VIII of H. R. 7472.

The Committee report [66] was presented by Senator

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[60] S. Rep. No. 257, 75th Cong., 1st Sess., *supra*, pp. 40-41.
[61] S. Rep. No. 2053, 74th Cong., 2d Sess.
[62] S. Rep. No. 879, part 2, 75th Cong., 1st Sess.
[63] S. Doc. No. 58, 75th Cong., 1st Sess., pp. 1-3; *supra*, pp. 44-47.
[64] S. Rep. No. 879, part 2, p. 6, 75th Cong., 1st Sess.
[65] *Infra*, pp. 49-51.
[66] S. Rep. No. 879, part 1, 75th Cong., 1st Sess.

McCarran on July 7, 1937.[67] The minority report[68] was presented by Senator King on July 8, 1937, and ordered printed.[69]

Title VIII of H. R. 7472 was debated and acted upon favorably on June 23, 1937.[70] Senator King spoke vigorously and at length against the measure.[71] He *read in full* to the Senate[72] the letter from the President, and also the accompanying *communication from the Chairman of the Federal Trade Commission*, which referred specifically to the *non-signer provisions* in State Fair Trade Acts and expressed the view that, under the decision of this Court upholding those statutes, the proposed legislation would make these provisions "*binding upon interstate commerce.*"[73] Later on, he stated in his own language his joinder in these objections:

> "My protest is first against the bill itself. I think the President was right in pointing out its evils, and *the Federal Trade Commission was right in its objections*, as stated in the letter to the President."[74]

Senator King also *related* the proposed legislation to the *non-signer provisions* in State Fair Trade Acts in the following language:

> " * * * If the rider is adopted and becomes law, it will permit manufacturers and distributors in New York, for instance, to enter into contracts with retailers in California, and to fix and maintain retail prices, though monopolies in the com-

[67] 81 Cong. Rec. p. 6871.
[68] S. Rep. No. 879, 75th Cong., 1st Sess., part 2.
[69] 81 Cong. Rec. p. 6892.
[70] 81 Cong. Rec. pp. 7486-7497.
[71] 81 Cong. Rec. pp. 7487-7494.
[72] 81 Cong. Rec. p. 7490.
[73] S. Doc. No. 58, pp. 1-3, 75th Cong., 1st Sess.; *supra*, pp. 44-47.
[74] 81 Cong. Rec. p. 7493.

modities referred to might result. And I might add that in California and other States *it has been held* that if the retail vendee gives *notice* to the public of his price-fixing contract with the distributor or manufacturer in New York *no other person in the State may sell the commodity at a price below* that fixed in such contract.

"I might add, in passing, that the Federal antitrust laws would not have the same meaning in all States. In those States where laws are passed permitting resale price fixing the efficacy of the Federal statutes would be impaired, but in those States which have not legalized price fixing, the antitrust laws would be effective. In the communication of the Chairman of the Federal Trade Commission it is clearly indicated that the enactment of the rider *would modify the antitrust laws in differing degrees in different States.* It would leave such laws in full force and effect in those States which did not legalize resale-price maintenance; but there would be *divergent policies in those States which legalize resale-price maintenance;* and the result would be that the Federal Government would be under the necessity of attempting to enforce divergent regulatory policies toward shipments made by the same manufacturer to dealers located in different States." [75]

The following colloquy between Senator King and Senator Frazier shows further recognition that the resale price maintenance to be authorized by the proposed legislation would *go beyond voluntary contractual resale price maintenance* by retailers willing to so contract:

"MR. FRAZIER: I should like to ask the Senator from Utah if he understands that this amendment—title VIII—would allow manufacturers *to fix the prices at which retailers* must sell their products to consumers.

[75] 81 Cong. Rec. p. 7491.

> "MR. KING. In reply may I say that if this amendment shall be enacted into law, it would seriously weaken the antitrust laws in all States which have enacted laws permitting the fixing of minimum prices for the resale of commodities. In fact, the enactment of the amendment *would permit manufacturers and distributors to fix prices at which retailers must sell their products* to consumers in those States which have enacted laws permitting minimum prices for the resale of commodities." [76]

It is significant that *neither Senator Tydings*, nor any other *proponent* of this legislation, *challenged or disputed* these assertions of Senator King [77] that the proposed lifting of the ban of the Sherman Act in the field of resale price maintenance would *extend* to the consequences of the *non-signer* provisions in State Fair Trade Acts.

Obviously, Senator Tydings, or some other proponent of this legislation, would have promptly challenged these statements by opponents of the legislation as to its purpose and effect *if the statements had been considered erroneous.*

Senator Tydings spoke briefly for the measure.[78] He emphasized the point that this legislation would *leave the subject of "fair trade practices" in each State to the local legislature*, saying:

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[76] 81 Cong. Rec. pp. 7491-7492.

[77] Including the quotation by Senator King of the view of the Chairman of the Federal Trade Commission to this effect.

[78] 81 Cong. Rec. pp. 7495-7496. The report of the debate shows a statement by Senator Tydings that he had brought this proposed legislation to the Senate floor as a rider to H. R. 7472 because Senator King had blocked consideration of S. 100 (pp. 7492-7493, 7495). Opposing counsel comment (p. 30) upon the legislative procedure utilized by the proponents of the bill, but this seems of no importance in the present discussion.

"MR. TYDINGS. What we have attempted to do is *what 42 States have already written* on their statute books. It is simply to *back up those acts*, that is all; to have a *code of fair trade practices written* not by a national board such as the N.R.A. but *by each State*, so that the people may go to the State legislature and correct immediately any abuses that may develop. We are trying to *decentralize* fair trade practices * * *"

* * * * *

"* * * * as 42 States have *already enacted similar legislation*, I ask, on the further ground of State rights and decentralized government, that the *action* of these 42 States be *supported*." [79]

Of particular significance is the following colloquy between Senator Barkley and Senator Tydings, in which the former expressed approval of the proposition that this legislative proposal *left the matter for determination by each State*, in contrast to former legislative proposals for a uniform Federal rule of law as to resale price maintenance:

"MR. BARKLEY" * * *

I desire to ask the Senator if that is to be interpreted to mean that the contracts which are permitted under this proviso are permitted so long as the articles are in free and open competition, and *so long as the State in which they are sold permits that sort of contract to be entered into and enforced.*

"MR. TYDINGS. That is correct.

"MR. BARKLEY. What would be the effect of a law of this kind in a State where there was no such authority to enter into contracts of this kind?

[79] 81 Cong. Rec. p. 7496.

"MR. TYDINGS. The State law would prevail.

"MR. BARKLEY. So the proposed legislation would not in any way infringe upon State laws that might prohibit that sort of contract?

"MR. TYDINGS. Not in the slightest degree.

"MR. BARKLEY. I will say to the Senator that of course that is *quite different* from the provisions which have been contained in similar legislation which has been pending in Congress ever since I have been here.

"MR. TYDINGS. That is true.

"MR. BARKLEY. And, in my judgment, the *change very much improves* the proposed legislation." [80]

Senator Austin also spoke in favor of the measure. He said:

"MR. AUSTIN. * * * As has been pointed out, *42 States* have enacted similar statutes *declaring what they call fair-trade practices* with respect to prices, and preventing price cutting, which is unfair and which tends to drive little men out of business. On the other hand, my own State, the State of Vermont, has exercised its independence and its right as a sovereign State to say, 'We do not want price fixing in this State.' Therefore, the State of Vermont can declare its own policy and have it effective with the cooperation of the Federal Government if this measure is enacted, because, if that is done, no manufacturer doing business in another State and transporting his goods into the State of Vermont can say there that the resale price of his product shall be so much and no less. Whether or not that is wise I am not un-

[80] 81 Cong. Rec. pp. 7495-7496. This comment is of importance in connection with petitioners' argument as to the Kelly-Capper bill which had been introduced in many earlier sessions; see *infra*, pp. 64, 75-78.

dertaking to argue. The point is that it is more important to the people of the United States of America to save fundamental institutions than it is to declare themselves upon a mere matter of economic policy. I am more in favor of preserving the independence of the several States, and *their right to manage their own affairs* than of fixing prices." [81]

The contention that Congress intended the local rule to govern only in the contractual aspect of resale price maintenance, and not in the non-signer aspect of that problem, is wholly inconsistent with the views thus expressed by Senators Tydings and Austin and approved by Senator Barkley.[82]

House Action on Title VIII of H. R. 7472.

The House *voted not to concur* in the Senate amendments to H. R. 7472 and conferees were accordingly

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[81] 81 Cong. Rec. p. 7496.

[82] We have just been served with a copy of the Government's *amicus* brief in this case, which quotes (p. 26) Senator Vandenberg as stating that not five percent of the membership of the Senate would know anything whatever about the amendment when the Senate voted on it (81 Cong. Rec. p. 7492). This language is not entitled to any weight in the light of the extensive quotations which we have made from the debates. Obviously, Senator Vandenberg was pressing for an adjournment (it was July 23rd). We imagine that similar comments as to lack of understanding of the Senate will be found in many passages in the Congressional Record as to many measures.

Senator Vandenberg's remarks may be contrasted with the remarks of Senator Barkley, made a few minutes later and appearing on the next following page of the Congressional Record, when Senator Barkley said:

> "But the bill is here, it is a part of the measure now before us, and we have to vote on it before the tax bill can be disposed of * * * That being true and the proposal in title 8 *being well understood*, I express the hope that we may arrive at a vote on it without unnecessary delay, so that Senators may express their feelings about it * * ** " (81 Cong. Rec. p. 7493).

After these remarks by Senator Barkley there ensued further debate extending over several pages (81 Cong. Rec. pp. 7493-7497). The amendment was then agreed to without a record vote (see 81 Cong. Rec. p. 7497).

appointed.[83] The Conference Report recommended that the House recede from its disagreement with the Senate amendment embodied in Title VIII.[84] On August 3, after debate on this recommendation in the House,[85] that body *voted to recede* from its disagreement with this amendment and also adopted the Conference Report in other respects.[86]

Representative Dirksen, one of the House conferees, said:

> " * * * I might say that I did favor and do favor the enactment of the Miller-Tydings bill. *It resulted from an Illinois case that went to the Supreme Court.* The Illinois Legislature had enacted a law prior to 1936 making it *possible for the manufacturer of merchandise to set the price at which it must be resold.* In other words, it *empowered the manufacturer to tell the retailer what he must get as a retail price* and if he refused to do so, the manufacturer could refuse to sell him further and also had an action at law. It so happened that the Seagram's Distillers Corporation, located in Indiana, sold some of its products to the Old Dearborn Distributing Co. in Chicago. Evidently, the distiller indicated the price at which the liquors must be sold and when the distributer refused to abide by such a price, there was a violation and court action. Thus the case found its way to the Supreme Court on a question of constitutionality of the statute. The Court ruled that this was a *matter of policy for the States to determine*, and thereby upheld the Fair Trade Act of Illinois.
>
> "A question then arose as to whether or not

[83] 81 Cong. Rec. pp. 7497, 7599. Senator King was one of the Senate conferees and thus had full opportunity to present his opposing views to the House conferees.

[84] 81 Cong. Rec. pp. 8134-8137.

[85] 81 Cong. Rec. pp. 8137-8143.

[86] 81 Cong. Rec. p. 8143. The Senate on August 4, 1937, agreed to this Conference Report without further debate; *ibid.* 8166-8168.

> the maintenance of such resale prices under a State fair trade act might not be in violation of the Sherman Anti-Trust Act of 1890 insofar as these transactions sprang from a contract in interstate commerce. This question was presented to the House Judiciary Committee and there determined by the reporting of the Miller bill. It was *essentially nothing more than an enabling act which placed the stamp of approval upon price maintenance transactions under State acts, notwithstanding the Sherman Act of 1890.*" * * * [87]

Representative Dirksen evidently fully understood that this "*enabling act*" extended to the non-signer provisions of State Fair Trade Acts.

Representative Gulkin, speaking upon the Conference Report, referred to the decision of this Court in the *Old Dearborn* case, saying:

> "* * * The report of the proponent of the bill, Mr. Miller, calls attention to the *opinion of Judge Sutherland*, upholding the constitutionality of the Illinois Price Fixing Act." [88]

The final speaker in the House was Representative McLaughlin, a member of the Judiciary Committee and of the subcommittee which conducted hearings on H. R. 1611.[89] He opened his remarks by emphasizing the *intent* of the proposed legislation to give full *scope* to State Fair Trade Acts:

> "In these remarks I shall refer to the Miller-Tydings amendment, which is included in the conference report, as H. R. 1611.
>
> "House bill 1611 is known as the Fair Trade *Enabling Act* because it is an act which *enables* fair-trade legislation passed by individual State

[87] 81 Cong. Rec. p. 8138.
[88] 81 Cong. Rec. p. 8139.
[89] 81 Cong. Rec. p. 8140. On behalf of the subcommittee he had reported the bill to the full Committee.

legislatures to become effective and to be *fully operative* within the respective States. It is *not* legislation which puts into effect a *new national policy* originating in Congress. Rather it is legislation which helps the States to put into effect a policy originating within the States themselves. It constitutes a method through which States are enabled to enforce their laws through the cooperation of the Federal Government. It lends to the States the assistance of the national legislation *making effective fair-trade practice acts* passed in the State legislatures."

"* * * A hearing was had on the bill before the Rules Committee and the committee passed a resolution for a rule. The bill has passed through the conventional course of procedure and the standing committee who have thoroughly considered it recommended to the House that it be enacted into law, *in order that the fair-trade practice acts passed by so many of the States of the Union may become vital laws, fully operative* and capable of performing the great service which they are designed to perform." [90]

In concluding his speech in the same vein Representative McLaughlin said:

"The States in which the acts have operated are satisfied with them. The other States which have recently enacted them based their enactment upon the beneficial results shown in the States where they have been in operation. However, State fair-trade practice acts have *never* had an opportunity to function *fully*, and they *never* will operate with *complete effectiveness*, nor produce the full benefit which they are capable of producing *until the removal of the existing Federal barrier* by the passage of the Miller-Tydings Fair Trade Practice Act, H. R. 1611. That act is now before us as an amendment to the conference re-

[90] 81 Cong. Rec. p. 8140.

port under consideration.

> "Forty-two States of the Union today look to the House of Representatives to pass this law which will *remove the barrier* now standing in the way of the *full and complete operation* of the respective State fair-trade practice acts".[91]

This language unquestionably reflects a clear purpose and intent to make the respective State statutes completely effective in their respective localities. The contention that Congress, in amending the Sherman Act, intended to give effect to only the signer provisions and not the non-signer provisions in these state laws, in transactions wherein such laws might clash with the unamended Sherman Act, is *totally at variance* with the broad and sweeping concepts thus repeatedly expressed.

Significant also here is the following description by Representative McLaughlin of the typical "State fair-trade practice act", including *express mention* of the *non-signer* provisions:

> "The State acts are substantially identical. They were enacted by the individual State legislatures and represent the wishes of the people of the respective States. The wisdom and soundness of the legislation has been passed upon by 42 State legislative bodies. H. R. 1611 will in effect *confirm and ratify* the judgment of the State legislatures which have passed *State fair-trade practice acts.* * * *
>
> "In other words, a State fair-trade practice act is an act which allows a seller of a trademarked or identified commodity and the purchaser of such commodity to agree that the purchaser of that commodity shall not sell the commodity at less than the price agreed upon between the buyer and the seller where the commodity is one

[91] 81 Cong. Rec. p. 8143.

which is in open competition with commodities of similar character. The State fair-trade practice acts in the respective States *practically uniformly provide that any retailer* selling a trade-marked commodity which comes within the provisions of the act, *knowing* that the owner of the commodity has provided by contract that the articles shall not be sold at less than a certain price, is *bound* by that contract *although he may not be a party to it*, and is liable for the penalties set up in the act against those who sell the trade-marked article at a price less than the price named as the selling price by the owner."[92] * * *

In language equally significant and important, Representative McLaughlin detailed as follows the refutation within the Committee of arguments against the proposed legislation, predicated upon the non-signer provisions in the State Acts:

"In the hearings before the committee and in the debates upon the bill in the committee itself, it was suggested that there are two points which may be considered in the nature of objections to the bill. The committee discussed these points and considered that they did not constitute valid objections. However, *in order to present the matter fully* to the House, these objections should be referred to. These objections are:

"First, That H.R. 1611, if enacted, would impose a penalty upon a seller of merchandise for selling such merchandise below the minimum price agreed upon in a contract *to which he is not a party.*"

* * * * *

"The objections were overruled by the committee after a consideration of the testimony bearing upon them and after full discussion of the objections.

[92] 81 Cong. Rec. pp. 8140-8141.

"The first objection, namely, that H. R. 1611, if enacted, will permit resale contracts to be binding upon parties *other than the parties to the contract itself*, is fully answered by the statement that *the respective State laws make provision that the contract shall be binding upon all those who sell the trade-marked article which is the subject of the resale contract whenever the person selling the article below the contract resale price does so willfully and knowingly.* This argument is well answered by the *controlling opinion of the Supreme Court of the United States* in the case of Old Dearborn against Seagram, *supra*, upholding the validity and constitutionality of the Illinois State Fair Trade Practice Act, where the Court says: [93]

" 'A challenge is directed against section 2, which provides that willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract made under section 1, *whether the person doing so is or is not a party to the contract*, shall constitute unfair competition, giving rise to a right of action in favor of anyone damaged thereby.

" 'It is first to be observed that paragraph 2 reaches not the mere advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things willfully and knowingly. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of *a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds willfully to resell in disregard of it.*

" 'Appellants here acquired the commodity in question with full knowledge of the then-existing

[93] The quoted language in the next three paragraphs is that of this Court in the *Old Dearborn* case, 299 U. S. at pp. 193-194.

restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealings, assent to the protective restriction, with consequent liability under paragraph 2 of the law by which such acquisition was contained.'

"Further complete answer to this objection is that *the respective States in the exercise of their wisdom and judgment* imposed the penalties provided in the respective State acts. The bill before us today, if enacted, *merely makes effective the law which has been enacted by the respective State legislatures to govern transactions within their own borders.*" [94]

This strong exposition by Representative McLaughlin of the *intent* of this "*enabling act*" to make the non-signer clause effective and of the legislative purpose to give *full scope* to every State Fair Trade Act in its locality, was followed by the adoption of the Conference Report within any further discussion.[95]

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[94] 81 Cong. Rec. p. 8142.

[95] 81 Cong. Rec. p. 8143.

Opposing counsel, obliged to admit (pp. 89-92) that Representative McLaughlin definitely expressed the understanding that the legislative proposal under debate would extend to the non-signer provisions of the State Acts, seek to avoid the effect of this circumstance by suggesting that "apparently" Representative McLaughlin was "unaware" that the phrase "or other conditions" contained in H. R. 1611 had been omitted from H. R. 7472, Title VIII, so that he did not understand what he was talking about. We show *infra*, pp. 65-69, that the phrase referred to has no importance in the present controversy. Apart from this, the statement by Representative McLaughlin during the course of the debate leaves no doubt that he was completely informed as to the history, background and purpose of the legislation. See 81 Cong. Rec., p. 8140, recording Representative McLaughlin's statement in which he referred to the many witnesses who had been heard by the subcommittee, of which he was a member, the briefs and statements which it had considered, and the long study and discussion, following which he had been commissioned to report the bill favorably to the full Committee on the Judiciary.

Legislative Proposals on Resale Price Maintenance at Prior Sessions of Congress

Substantially the same bill which was introduced in the First Session of the 75th Congress as S. 100 and H. R. 1611, had been introduced as S. 3822 in the Second Session of the 74th Congress. The legislative history of this unenacted measure at this prior session appears to us to have very little weight, in view of the substantial and significant legislative history materials found in the progress of the legislation towards enactment at the First Session of the 75th Congress. However, the legislative history of S. 3822 at the preceding session, insofar as it has any significance on the issues in litigation, fully supports our position.

S. 3822 was introduced by Senator Tydings on January 27, 1936, and was referred to the Senate Judiciary Committee.[96] That committee reported favorably with a report[97] reproduced in the report made by committees at the following session on S. 100 and H. R. 7472.[98]

S. 3822 came up in the Senate and was passed on June 1, 1936.[99] The only discussion was the following statement by Senator Tydings, in response to a request by Senator McKellar for explanation of the bill, which had just been read:

> "MR. TYDINGS. In reply to the Senator from Tennessee let me say by way of brief explanation that this bill was reported unanimously from the Committee on the Judiciary after hear-

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[96] 80 Cong. Rec. p. 1007.

[97] S. Rep. No. 2053, 74th Cong., 2nd Sess.; 80 Cong. Rec. p. 7565.

[98] S. Rep. No. 257, 75th Cong., 1st Sess.; S. Rep. No. 879, part 1. 75th Cong., 2nd Sess.; see *supra*, pp. 40-41, 47-48.

[99] 80 Cong. Rec. p. 8433.

> ings were held. It grows out of the fact that *12 states*—New York, *Illinois*, Pennsylvania, New Jersey, Oregon, Washington, Wisconsin, Iowa, Maryland, Ohio, Virginia, Rhode Island, and *California*—have all adopted acts within their states regulating loss-leader selling and the making of contracts between a manufacturer and a distributor of an article. This has been done in an effort to make trade equal and fair and to eliminate discrimination. After hearings, the Committee reported the bill unanimously and favorably. It simply *backs up the action of those states* which have already enacted *valid laws* which have been *passed on by the courts*."

It will be noted that Senator Tydings, in this explanatory statement, mentions "*loss-leader selling*" [100] as well as "the making of contracts between a manufacturer and a distributor", as regulated by the "valid" State laws to which he referred. It also will be noted that he used the expression "*backs up the action of those states*" in speaking of his bill. It will finally be noted that he refers to the *courts having "passed on"* these "*valid laws*" enacted by the states which he mentions.

While, at the date on which Senator Tydings thus spoke (June 1, 1936), this Court had not passed on the constitutionality of State Fair Trade Acts,[101] the court of last resort of California had then already upheld the con-

[100] The reference to "loss-leader" selling further evidences the understanding that the legislation under discussion would make operative in interstate commerce the non-signer provisions in the State Fair Trade Acts, since the practice of "loss-leader" selling could not be dealt with effectively if resale price maintenance depended only on voluntary agreements and third persons with notice were not bound. A reseller addicted to the practice of "loss-leader" selling could not be expected to become a voluntary party to a resale price maintenance contract.

These comments apply to other references in the debates and reports to "loss-leader" selling.

[101] The decision of this Court in the *Old Dearborn* case was rendered on December 7, 1936.

stitutionality of the Fair Trade Act of that State, with *particular* reference to and emphasis upon the *non-signer* provisions (Section 2) and so had the lower state courts in Illinois.[102] Senator Tydings obviously referred to these decisions when he spoke of the courts having "passed upon" these "valid" State laws.

After being passed by the Senate on June 1, 1936, S. 3822 progressed no further at the second (and final) session of the 75th Congress, which adjourned on June 20, 1936.[103]

The resale price maintenance bills in earlier sessions of Congress, which are referred to by opposing counsel had a much more remote relationship to the legislative proposal adopted in 1937. These earlier bills, antedating the development of State Fair Trade Acts and the jurisprudence thereunder, proposed a Federal statutory rule on resale price maintenance. Congress, being unwilling to enact a rule, turned the problem over to the States through the Miller-Tydings Amendment. There is significance in the contrast between what was proposed and not done in the earlier years, and what was done in 1937, with a demonstrated clear Congressional intent "*to decentralize fair trade practices*".[104]

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[102] *Max Factor Co. v. Kunsman*, 5 Cal. 2d. 446; *Pyroil Sales Co. v. Pep Boys*, 5 Cal. 2d. 784. These decisions were rendered on February 27, 1936, and rehearing applications were denied on March 26, 1936. While the similar decisions by the Illinois Supreme Court were not rendered until June 10 and June 17, 1936 (*Joseph Triner Corp. v. McNeil*, 363 Ill. 559; *Seagram-Distillers Corp. v. Old Dearborn Distributing Co.*, 363, Ill. 610), the decisions of lower Illinois courts, which were subsequently affirmed by the Illinois Supreme Court, had been rendered some time prior to June 1, 1936.

[103] 80 Cong. Rec. pp. 10549, 10893.

[104] Senator Tydings in 81 Cong. Rec. p. 7496. See *infra*, pp. 51-52.

There Are No Differences Between the Language of the Miller-Tydings Amendment and the Language of S. 100 and H.R. 1611 Which Are of Any Significance in the Present Controversy.

Various changes in language were proposed or made as the legislative proposal, which culminated in the Miller-Tydings Amendment, progressed from introduction to adoption at the first session of the 75th Congress. We will limit our discussion to the two changes which opposing counsel claim to have significance.

As orginally introduced, both S. 100 and H. R. 1611 proposed to lift the ban of the Sherman Act from "contracts or agreements prescribing minimum prices or other conditions for the sale of a commodity * * * when contracts or agreements of that description are lawful as applied to intrastate transactions". When this legislative proposal became Title VIII of H. R. 7472 in the Senate Committee on the District of Columbia, the phrase "or other conditions" was dropped.

Opposing counsel argue (pp. 56-57, 83-87) that this change in language was made presumably to meet the point urged in the communication from the Chairman of the Federal Trade Commission [105] that the proposed legislation would make the non-signer provisions in State Fair Trade Acts "binding upon interstate commerce". This argument was made in *Pepsodent Co. v. Krauss Co.*, and was there rejected by Judge Borah, who said on the point:

> "The defendant seeks to make much of the fact that the words 'or other conditions' were omitted from the original text of H. R. 1611 and S. 100 when the Miller-Tydings Act was added as

[105] S. Doc. No. 58, 75th Cong., 1st Sess.

> a rider to H. R. 7472. It is argued that H. R. 1611 and S. 100 sought to legalize contracts of a much broader scope than does H. R. 7472; * * * "
>
> "The defendant's argument is not persuasive. Since the present controversy *relates wholly to prices*, the omission of the words '*or other conditions*' from the measure as finally enacted *could not possibly have a bearing upon the present issue.*" [106]

The view expressed by Judge Borah is obviously correct. The non-signer provisions (Section 2) in State Fair Trade Acts do not depend for their effectiveness upon any recitals of "other conditions" in the resale price maintenance agreements legalized by such statutes. All that is requisite for Section 2 to be operative is that (1) an agreement prescribing minimum prices shall have been entered into with other resellers, and (2) the non-signer, against whom Section 2 is to be invoked, shall have had notice of those agreements.

The legislative record does not state why this phrase "or other conditions" was dropped when this legislative proposal was written into H. R. 7472 as Title VIII. The only reference to this phrase in the whole legislative history appears in the separate report of Representative Celler, joined by Representative Ramsey, on H. R. 1611. In this report [107] it is asserted that this language would open

> "the road to sales contracts tying together two different products, while legislation is pending before Congress to outlaw that very practice."

This objection, *wholly unrelated to the non-signer aspect* of State Fair Trade Acts, furnishes a possible

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[106] 56 F. Supp. at pp. 926-927.
[107] H. R. Rep. No. 382, part 2, p. 6, 75th Cong., 1st Sess.

reason for the omission of these words when the legislative proposal was incorporated in Title VIII of H. R. 7472.[108]

Opposing counsel argue (pp. 86, 87) that the omission of the phrase "or other conditions" receives added significance when considered with another amendment which consisted in the insertion by floor amendment in the Senate,[109] of a specific prohibition against horizontal price-fixing agreements in Title VIII of H. R. 7472. The argument (pp. 56-57, 81-83) is that when Senator Tydings, in presenting this amendment, said that it eliminated objection or opposition which "the administration" had expressed to the legislation, he meant that what had removed this objection or opposition was the antecedent dropping of the phrase "or other conditions" plus the floor amendment prohibiting horizontal price-fixing agreement.

That such was not the situation, and that what Senator Tydings said about eliminating opposition or objection from "the administration", *related only to his floor amendment prohibiting horizontal price fixing*, will appear beyond question from the following quotation of the full presentation of this floor amendment by Senator Tydings:

> "MR. TYDINGS. Mr. President, I offer an amendment to the committee amendment, which I ask to have stated.

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[108] The fact that the legislative record nowhere contains any statement or explanation as to why the words "or other conditions" were dropped from this proposed legislation at this stage makes pertinent the following observation in *Trailmobile Co. v. Whirls*, 331 U. S. 40, 61, (1947):

> "* * * Moreover, as has been noted, the most important committee changes relied upon were made without explanation. The interpretation of statutes cannot safely be made to rest upon *mute* intermediate legislative maneuvers."

[109] 81 Cong. Rec. p. 7487.

"The PRESIDING OFFICER. The amendment to the amendment will be stated.

"The CHIEF CLERK. On page 80, line 1, after '1914', it is proposed to insert a colon and the following:

'*Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers or between producers or between wholesalers or between brokers or between factors or between retailers or between persons, firms or corporations in competition with each other.'

"The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from Maryland (Mr. Tydings) to the amendment reported by the committee.

"MR. TYDINGS. Mr. President, I am not going to make a speech now; but I should like to say that the amendment which I have just offered has been worked out by certain administration leaders and myself and is entirely satisfactory to me; and I think I am authorized to say that with that amendment the administration is not now opposed to this title of the bill.

"MR. KING. Mr. President, may I inquire of the Senator from Maryland for whom he speaks when he says 'the administration'?

"MR. TYDINGS. The Attorney General's Department.

"MR. KING. Will the Senator explain the purpose of the amendment and its significance?

"MR. TYDINGS. In my judgment, Mr. President, the amendment is unnecessary because the provision as now found in the bill allows none of the things which the amendment specifically

> eliminates; but, in order that there may be no misunderstanding and that the element of competition may be kept forward throughout the process projected in this measure, the amendment has been offered. I took up the matter with the Attorney General and *we worked out this amendment;* and so far as I know and believe, it is an accurate statement that forces which were formerly opposed to this title of the bill have no particular objection to it at the present time." [110]

Other Arguments of Petitioners on Legislative History Are Also Without Merit.

Opposing counsel stress (pp. 11, 49, 71-74, 88-89) references during Congressional consideration of this legislation to the making legal of what was condemned in *Dr. Miles Medical Co. v. Park & Sons,*[112] and to writing into law the dissent of Mr. Justice Holmes in that case.

There is no such limiting significance in these remarks. While the direct adjudication in the *Dr. Miles* case related to contractual resale price maintenance, the discussion in that opinion extended further, as shown in the following language:

> "Nor can the manufacturer by rule and *notice, in the absence of* contract or *statutory right,* even though the restriction be known to purchasers, fix prices for future sales." [113]

Accordingly, it appears that the non-signer provisions in State Fair Trade Acts, as well as the provisions legalizing resale price maintenance agreements,

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[110] 81 Cong. Rec. p. 7487. This explanation was repeated by Senator Tydings in a colloquy with Senator Schwellenback. See 81 Cong. Rec. p. 7496.

[112] 220 U. S. 373 (1911).

[113] 220 U. S. at p. 405.

represented the legalization of what the *Dr. Miles* decision had declared to be illegal.

While the dissent of Mr. Justice Holmes in the *Dr. Miles* case, like the prevailing opinion, dealt primarily with contractual resale price maintenance, the following passage in that dissent expresses a philosophy which *would apply with as much force to statutory resale price maintenance against non-signers* as it would to resale price maintenance agreements:

> * * * "I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. * * * "[114]

Furthermore, if there is any significance in the legislative references to the *Dr. Miles* case, then there must be even greater significance in the several references, in the history of the enactment of this legislation, to the recent decision in *Old Dearborn* case, wherein the constitutionality of State Fair Trade Acts, including particularly the *non-signer clause, had been considered and upheld.*[115]

Opposing counsel also attach significance (pp. 52, 54, 55, 77) to the fact that Senator Tydings made no specific mention or exposition of the *non-signer* provisions in State Fair Trade Acts, when he spoke in behalf of this legislation. The complete answer to this is that

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[114] 220 U. S. at p. 412.

[115] See *supra*, p. 36, for our argument on the significance of these references.

his main speech [116] came *after Senator King had mentioned the non-signer provisions repeatedly* in his opposing speech.[117] There was accordingly no need for Senator Tydings to mention the non-signer provisions unless he took issue with Senator King and the Chairman of the Federal Trade Commission in their expressed view that the pending legislative proposal embraced the non-signer provisions of State Fair Trade Acts, as well as the resale price maintenance agreement provisions thereof. We have already pointed out [118] that the fact that Senator Tydings did not deny these argumentative assertions of Senator King *clearly meant that he did not dispute them, indeed conceded them.*

Opposing counsel also emphasize (pp. 52, 53, 55, 78, 79, 84, 88) references to the pending legislation proposal as authorizing "agreements" or "contracts" for resale price maintenance. Here again, what was said accurately described one essential feature of the statutory plan.[119] Moreover, in the final debate in each branch of Congress, the *non-signer* provisions were also *specifically mentioned* and referred to at length,[120] without any sug-

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[116] 81 Cong. Rec. pp. 7495-7496.

[117] 81 Cong. Rec. pp. 7490-7491.

[118] *Supra*, p. 51.

[119] Opposing counsel criticize (pages 91-92) Representative McLaughlin for representing H. R. 1611 as a "permissive" act. Representative McLaughlin's statement is in accord with the language used by the Supreme Court of Wisconsin in upholding the Fair Trade Act of that State, in *Weco Products Company v. Reed Drug Company*, 225 Wis. 474 (1937), where the court said (pages 486-7):

> "The Fair Trade Act does not fix prices or require that prices be fixed. It does not regulate anything or anybody. It is permissive only * * * "

Doubtless, what the Supreme Court of Wisconsin and Representative McLaughlin had in mind, was that the Fair Trade Acts do not compel a manufacturer using a trademark, brand or name to establish a resale price; the case is not one of compulsory price fixing as in the case of statutes setting up State Boards with authority to fix obligatory prices. For a discussion of the difference between permissive laws (Fair Trade) and compulsory laws (Unfair Practice), see Miller, *"Unfair Competition"* (1941), pp. 244-245.

[120] 81 Cong. Rec. pp. 7490-7491; 8138-8143.

gestion on the part of any proponent of the measure, or any one else, that the opposition was in error in asserting (as Senator King did) that the legislation would extend to the non-signer aspect of State Fair Trade Acts.

The same comment also applies to the efforts of opposing counsel to capitalize (pp. 52-53, 77, 81) on the absence of specific mention of the non-signer provisions in some of the earlier committee reports.[121] The *non-signer* provisions, in addition to being well *publicized* in the printed communication from the Chairman of the Federal Trade Commission sent to the Senate by the President,[122] were also quoted and specifically mentioned in the House Committee report on H. R. 1611,[123] and were quite extensively used as an opposing argument in the Senate Committee minority report on Title VIII of H. R. 7472.[124]

Opposing counsel also seek to attribute signifi ance (p. 54) to the characterization of this legislative proposal by Senator Tydings as "*not a price-fixing measure*" and to his accompanying assertion that he had "*never voted for a price-fixing bill*".[125] It is obvious that, in making these statements, Senator Tydings had in mind the then recent *characterization* of the Illinois Fair Trade Act by this Court as *not a "price-fixing law"* and hence not open to constitutional objection on that ground.[126] Speaking particularly of the non-signer pro-

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121 S. Rep. No. 2053, 74th Cong., 2d Sess.; S. Rep. No 257, 75th Cong., 1st Sess.

122 S. Doc. No. 58, pp. 2-3, 75th Cong., 1st Sess.

123 H. R. Rep. No. 382, part 1, p. 2, and part 2, p. 24, 75th Cong., 1st Sess.

124 S. Rep. 879, part 2, pp. 4-6, 75th Cong., 1st Sess.

125 81 Cong. Rec. p. 7496.

126 299 U. S. at pp. 191-193.

visions (Section 2), this Court there said:

> "* * * The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and *not as an end in itself.*" [127]

The foregoing analysis demonstrates that the remarks of Senator Tydings which are emphasized by opposing counsel actually reflected his appreciation of the *close relationship* between the Miller-Tydings Amendment and the *non-signer* provisions of State Fair Trade Acts.

We believe that our detailed review of the legislative history of the Miller-Tydings Amendment leaves no room for doubt as to the interpretation to be placed upon the statute. The conclusion necessarily to be reached from a study of the debates and reports has been well summarized in the following statement:

> "The legislative history of the Miller-Tydings Bill fully supports the conclusion that Congress intended to give the states a free hand to enforce their programs and had no intention of retaining the sole jurisdiction over non-contracting dealers who are engaged in interstate commerce. The Federal Bill, sometimes referred to as an enabling act, was passed with full knowledge of the nature and extent of the duty to observe prices imposed by the State Acts and with the very purpose of imposing an analogous duty upon those engaged in interstate commerce. In the hearings before the House Committee and in the

[127] Following the views thus expressed by this Court, the Louisiana Supreme Court definitely classified the Louisiana Fair Trade Act as *"not a price-fixing statute"* in *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 982, (1942), using substantially the language of this Court quoted above.

debates upon the bill in the committee, objection was made to imposing a duty upon non-contracting dealers but the objections were overruled by the committee after full discussion." [127a]

The Government's brief suggests (p. 14) that the language of the Louisiana Act goes beyond the exemption established by the Miller-Tydings Amendment by authorizing maximum prices which might bring the cases within the decision in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). The suggestion cannot be maintained in view of the decision in *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 968 (1942), in which the Court said:

> " * * * Since the statute precludes sales at prices less than those stipulated in the contract and places no restriction on sales at prices in excess of those stipulated, the statute is *in effect establishing a minimum price.* Our conclusion, therefore is that a contract which provides that the seller will not resell the commodity at less than the minimum retail or resale price complies with the statutory requirements of the Louisiana Fair Trade Act."

This decision has been recognized as a conclusive determination of the Louisiana law. See *Mennen Co. and Bristol-Myers Co. v. Krauss Co.*, 134 F. 2d 348 (C.A. 5, 1943). These circumstances refute the Government's suggestion.

[127a] See Note, 16 New York Univ. L. Quar. Rev. 144 (1938).

The Absence of Express Reference In the Miller-Tydings Amendment to the Non-Signer Provisions In State Acts Is of No Significance. When the Miller-Tydings Amendment Was Enacted, Congress Did Not Intend to Set Up A Federal Code of Fair Trade Practices. The Intent Was to Leave the Subject Matter to the States.

Opposing counsel contend (pages 93-94) that support for their position is to be found by comparing the language of the Miller-Tydings Amendment with the language of the bills introduced in Congress in earlier years, including particularly the Capper-Kelley bill[128] which was first introduced in 1917 and never enacted (although introduced in every session following 1917 to 1933). We believe that the suggested contrast so far from adding to the argument for the petitioners, contributes to its denial.

The Capper-Kelly bill envisaged a system of uniform federal legislation which would in effect have established a federal code of fair trade practice. The Miller-Tydings Amendment, on the other hand, as its language shows, contemplated that State law and not National law should be the guide to the solution of the resale price maintenance problem.[129] The difference in approach[129a] evidenced by the Miller-Tydings Amendment was expressed by Senator Tydings in the language

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[128] As noted by opposing counsel, at the time this bill was drafted State Fair Trade acts had not emerged.

[129] See discussion, *supra*, pp. 7-14.

[129a] This difference in approach was referred to by Senator Barkley when he commented that the proposed legislation was "*quite different* from the provisions which have been contained in similar legislation which has been pending in Congress ever since I have been here" and added "and in my judgment *the change very much improves* the proposed legislation". 81 Cong. Rec. pp. 7495-7496, *supra*, pp. 52-53.

quoted *supra*, pages 51-53, when he said: [130]

> "What we have attempted to do is what 42 States have already written on their statute books. It is simply *to back up those acts*, that is all; to have a code of fair trade practices written *not by a national board* such as the N.R.A. but *by each State* so that the people may go to the State legislature and correct immediately any abuses that may develop. We are trying to *decentralize* fair trade practices * * * ." [130a]

Once the proposed federal regulation ceased to move in the direction of a Federal code which would have embodied a uniform national policy and, instead, took as its objective an enabling act which would authorize each State to apply its local law to transactions within the State which might affect interstate commerce, it became unnecessary for the enabling act to go into any further detail. The policy of decentralization to which Senator Tydings referred contemplated the possibility that State laws might vary among themselves, as in fact they do.[131]

It appears clearly from the foregoing that the Congressional intent in enacting the Miller-Tydings Amendment was *not* to impose a Federal rule of resale price maintenance policies uniformly applicable to the whole

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[130] 81 Cong. Rec. p. 7496.

[130a] It was repeatedly pointed out during the consideration of the bills that were introduced in the 74th and 75th Congresses that the legislation which they proposed was not legislation to put into effect a national policy but rather legislation "which helps the States to put into effect a policy originating within the States themselves" see the remarks of Representative McLaughlin, 81 Cong. Rec. pp. 8140-8143, *supra*, pp. 58-62.

[131] See charts at CCH Trade Regulation Service, Paragraphs ¶ 7011 ff.

In the communication from the Chairman of the Federal Trade Commission which the President transmitted to Congress when it was considering the Miller-Tydings Amendment, and to which Congress declined to defer, special reference was made to the fact that the adoption of the amendment would permit divergent fair trade policies in the various states. See *supra*, pp. 45.

country but, on the contrary, to permit each State to determine its own manner of handling the problem, subject only to the requirement that the commodities be trade-marked and in completition with other commodities of the same class, and that there be no horizontal price fixing. Under such circumstances it would have been inconsistent for Congress to have included a section in the Miller-Tydings Act comparable to Section 2 of the State Fair Trade Acts.

When Congress enacted the Miller-Tydings Amendment, it necessarily understood that having thereby exempted resale price maintenance contracts and agreements under State Fair Trade Acts from the impact of the Sherman Act, it need make no special reference to the non-signer provisions of the State Fair Trade Acts. This was understood because when Congress removed resale price maintenance contracts under State Fair Trade Acts from invalidity under the Sherman Act, the States then possessed full power to deal with all situations arising under their respective Fair Trade Acts, uninhibited by the Commerce Clause. Congress, therefore, effectuated a policy of State control of resale price maintenance by a validation, with respect to interstate commerce, of resale price maintenance contracts or agreements valid under State law, leaving to each State its own determination of the consequences it might deem fit to attach to the contracts or agreements authorized by its own Fair Trade Act. Compare *Parker v. Brown*, *supra* pages 13-14, where a State regulation of interstate commerce was upheld as constitutional—even without the benefit of a Federal act (such as the Miller-Tydings Amendment) indicating that the Sherman Act was not to apply in the field—the Court saying:

> "The state in adopting and enforcing the prorate program made no contract or agreement

and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. * * * " (317 U. S. p. 352).

"Hence we cannot say that the effect of the State program on interstate commerce is one which conflicts with Congressional policy." (317 U. S. p. 368)

This language is applicable *a fortiori* to the present cases, in view of the positive action of Congress in enacting the Miller-Tydings Amendment.

SUMMARY AND CONCLUSION

The District Court and the Court of Appeals were right in holding that the respondents were entitled to the relief sought in these suits. The transactions of the respondents were in accordance with the provisions of the Louisiana Fair Trade Act and the petitioners, having notice of the Fair Trade Contracts, were bound to maintain the resale prices of the trade-marked articles distributed by the respondents. The language of the Miller-Tydings Amendment is on its face sufficient to support the conclusions of the lower courts, but reference to the legislative history of the Act leaves no reasonable doubt as to the correctness of the decisions below. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Section 1 of the Sherman Anti-Trust Act in Original Form and as Amended by Miller-Tydings Amendment

For purposes of ready comparison we set out in parallel columns Section 1 of the Sherman Act in its original language and that Section as amended and re-enacted by the Miller-Tydings Amendment, indicating in the latter by italics the language added by the Amendment (no language was deleted by the Amendment):

Original Enactment

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Amended Re-enactment

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; *Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distriguted by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any*

statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section E, *as amended and supplemented, of the Act entitle 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.* Every person who shall make any such contract or engage in any such combination or conspiracy *hereby declared to be illegal*

shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or both said punishments, in the discretion of the Court."[1a]

[1a] As this amended re-enactment of Section 1 of the Sherman Act now appears in 15 U.S.C. Sec. 1, the references in three places have been rephrased to specify the appropriate U. S. Code sections identified by these references. This editorial rephrasing of course makes no change in the legal meaning and effect of the statute.

APPENDIX B

Louisiana Fair Trade Act.[2a]

Act 13 of 1936

AN ACT

To protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

Section 1. Be it enacted by the Legislature of Louisiana, That no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.
2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

[2a] On May 1, 1950, this statute became Sections 391-396 of Title 51 of the Louisiana Revised Statutes of 1950. No change in language of any significance here was made in this revision.

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.
2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.
3. By any officer acting under the orders of any court.

Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. The following terms, as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

Section 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Section 6. This Act may be known and cited as "Fair Trade Act."

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In the Supreme Court of the United States

SCHENLEY INDUSTRIES, INC., ET AL., *Petitioners*

v.

CARLTON DISTILLERS CORPORATION

SCHENLEY INDUSTRIES, INC., ET AL., *Petitioners*

v.

SEAGRAM DISTILLERS CORPORATION

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Memorandum for the United States of America Curtis in Support of the Petition for Writs of Certiorari

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL., *Petitioners*

v.

CALVERT DISTILLERS CORPORATION

No. 443

SCHWEGMANN BROTHERS, ET AL., *Petitioners*

v.

SEAGRAM DISTILLERS CORPORATION

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Memorandum for the United States as Amicus Curiae in Support of the Petition for Writs of Certiorari

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The question presented in these cases is whether the Miller-Tydings Act applies to and therefore exempts from the prohibitions of Section 1 of the Sherman Act, the non-signer clause of the Louisiana fair trade statute. That clause gives a right

of action against a person, not a party to a resale price maintenance contract authorized by the statute, who knowingly sells a commodity at less than the price stipulated in such a contract. Forty-five states have enacted fair trade statutes containing a non-signer clause substantially identical (except in two states) with that of the Louisiana statute here involved. *Report of the Federal Trade Commission on Resale Price Maintenance* (1945), pp. 74-75; 2 CCH Trade Reg. Serv., pars. 7011, 7096, and pp. 7503 *et seq.* Thus a ruling by this Court on the question which the petition for certiorari presents will determine whether the non-signer clause of the fair trade laws of at least 43 states comes within the exemptions from the antitrust laws given by the Miller-Tydings Act.

It has long been settled that the Sherman Act makes it unlawful to enter into any agreement, express or implied, limiting or fixing the price at which the purchaser of a commodity may resell.[1] The bar applies even as against rights asserted under copyright (*Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *Interstate Circuit* v. *United States*, 306 U. S. 208, 221) or patent (*Ethyl Gasoline Corp.* v. *United States*, at pp. 456-457; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 250). The rule laid down by Congress thus covers the entire field

[1] *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 188-189; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 721.

of interstate and foreign commerce "except as the seller moves along the route which is marked by the Miller-Tydings Act." *United States* v. *Bausch & Lomb, supra,* at p. 721.

As to interstate and foreign commerce, Congress has, therefore, occupied the "legislative" field and has barred the door to inconsistent state legislation, except as authorized by the Miller-Tydings Act. A state may not "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker* v. *Brown,* 317 U. S. 341, 351.

The construction which the court below placed upon the Miller-Tydings Act raises an issue of major public importance in the interpretation of the antitrust laws. Whether or not the exemption conferred by the Miller-Tydings Act embraces the non-signer provisions of state fair trade statutes is of wide significance to business, to consumers and to the federal government. In many of the proceedings brought by the Government under the Sherman Act the defendants claim full or partial immunity for their conduct under the Miller-Tydings Act.[2] In addition, it is a matter of grave concern to the Government that statutory exemptions from the antitrust laws be confined to their true limits. For these reasons and because the

[2] See *Univis Lens* case, *supra,* at pp. 247, 252-254; *Bausch & Lomb* case, *supra,* at pp. 723-724; *United States* v. *Frankfort Distilleries, Inc.,* 324 U. S. 293, 296-297.

Government believes that the decision below is erroneous it is submitting this memorandum in support of the petition for certiorari.

The Miller-Tydings Act, which was enacted through the medium of a rider to a revenue bill for the District of Columbia (50 Stat. 673, 693), amends Section 1 of the Sherman Act by providing that nothing "herein contained" shall render illegal "*contracts or agreements*" prescribing minimum resale prices for a commodity bearing the producer's or distributor's trademark, brand or name when "contracts or agreements" of that description are legal "as applied to intrastate transactions," under any "statute, law, or public policy" of the state of resale. The Act further provides that "the making of such contracts or agreements" shall not be an unfair method of competition under Section 5 of the Federal Trade Commission Act. Certain qualifications and limitations upon the exemptions thus created are not pertinent here.

The present petitioners, operators of a large retail store in New Orleans, Louisiana, have not entered into any resale price maintenance contract or agreement applicable to the sale of respondents' products. The district court nevertheless enjoined petitioners from selling respondents' products "at prices less than the minimum prices" for such products stipulated in resale price maintenance contracts made between respondents and retailers other than petitioners (Calvert R. 81; Seagram

R. 78). On appeal, the court below affirmed the judgment by a divided vote upon the ground that the Miller-Tydings Act removed from the scope of the Sherman Act any action which a state fair trade law validates as to intrastate commerce (Calvert R. 101-102).[3]

We think that the decision below does violence to the plain language of the Miller-Tydings Act. That Act explicitly defines the conduct given exemption, namely, "contracts or agreements" for resale price maintenance which are permissible under the law of the locality. The Act, by its terms, removes the bar of the Sherman Act as to such contracts, which are voluntary obligations, and does nothing more. When a state provides by legislative fiat that in certain circumstances strangers to a retail price maintenance contract may not sell at less than the price stipulated in contracts of this character made by others, such state-created cause of action is not within the statutory exemption of "contracts or agreements prescribing minimum prices for the resale of a commodity." The parallelism between the language of the Miller-Tydings Act and that of Section 1 of the Louisiana statute making it lawful to enter

[3] The court held that the transactions which were the subject of the proceedings brought by the respondents so affect interstate commerce and the exercise of federal power over it as to bring them "within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them" (Calvert R. 98-99).

into a "contract" for resale price maintenance,[4] further indicates that it is such *contracts* which the federal statute exempts, not an *in invitum* obligation with respect to minimum sales price imposed by the state on persons not parties to such a contract.

We submit that Judge Russell, dissenting in the court below, correctly construed the scope of the exemption conferred by the Miller-Tydings Act. He said (Calvert, R. 105):

> Thus Congress has legalized the *contract* validated by the State law, but not every provision of the statute. If, over and beyond the establishment of the legality of the contractual obligation to maintain minimum prices, the State statute otherwise authorizes conduct or procedure which runs afoul of a Congressional protection of interstate commerce from unlawful restraint, such as the appellant defendant here asserts to be true as to him, such provision of the State statutes must yield to paramount Federal law.

This Court has held that subsequent federal legislation is not to be construed as impliedly limiting the scope or application of the federal antitrust laws in the absence of a clear statutory expression of such limitation. *United States* v. *Borden Co.*, 308 U. S. 188, 198-199, 203-206; *U. S. Al-*

[4] See petition for certiorari, pp. 11, 18.

kali Association v. *United States*, 325 U. S. 196, 206-211. The expanded interpretation of the Miller-Tydings Act adopted by the court below would be justified, if at all, only if plainly required by legislative history. But on the point in issue, legislative history gives no clear or even persuasive indication of congressional purpose. In the court below both the majority opinion and the dissenting opinion rejected legislative history as a source of guidance (Calvert, R. 101, 103).

For the reasons stated, it is respectfully submitted that the petition for certiorari raises an important question of federal law which warrants review by this Court.

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Solicitor General.

December 1950.

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S. Rep. 2053, 74th Cong., 2d Sess. — 21

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL., PETITIONERS

v.

CALVERT DISTILLERS CORPORATION

No. 443

SCHWEGMANN BROTHERS, ET AL., PETITIONERS

v.

SEAGRAM DISTILLERS CORPORATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

These cases present the question of whether the nonsigner clause of a typical state "fair-trade" act conflicts with the Sherman Act, as amended by the Miller-Tydings Act. The Government is concerned that exemptions from the antitrust laws should be confined to the limits specified by Congress in enacting them. The decision below

permits imposition upon nonconsenting retailers of a resale price structure established by private persons without governmental supervision. The Government believes that such compulsory resale price maintenance is forbidden by the Sherman Act and is not exempted from that Act by the Miller-Tydings Amendment, which sanctions only "contracts or agreements."

STATEMENT

Petitioners are a partnership which operates a large retail store in New Orleans, Louisiana. Respondents are distributors of whiskey and gin products which bear the trade-marks or trade names of parent corporations of the respondents, or of affiliates of those parent corporations (Calvert R. 84; Seagram R. 80). Respondents do not sell direct to retailers, but sell through wholesalers. Respondents have entered "fair trade" contracts with a small number of retail dealers in Louisiana [1] under which the dealers agree to maintain the resale prices from time to time established by respondents on the products sold by them. Petitioners have not entered into any resale price maintenance contract or agreement applicable to the sale of respondents' products.

[1] Respondent Calvert alleged that it had 105, and respondent Seagram alleged that it had 106 such contracts with retailers in Louisiana (Calvert R. 8; Seagram R. 8). During the fiscal year ending June 30, 1950, some 6,165 dealers in Louisiana paid the federal occupation tax for resale of distilled spirits. Annual Report of Commissioner of Internal Revenue (1950), p. 152.

These actions were commenced by separate complaints filed by respondents in the United States District Court for the Eastern District of Louisiana on November 25, 1949 (Calvert R. 2; Seagram R. 2). Each complaint alleged that petitioners had sold, at retail to the consuming public, products bearing the trade names of the respective respondent at prices below the minimum retail prices set forth in a schedule of prices promulgated by it under contracts between it and various other retail liquor dealers in Louisiana obligating those dealers to charge the minimum prices specified by the respondent (Compl. pars. IX, X, Calvert R. 7–9; Compl. pars. IX, X, Seagram R. 7–9). Copies of the contracts were attached as exhibits to the complaints (Compl. Ex. A, Calvert R. 14; Compl. Ex. A, Seagram R. 14).

Each respondent alleged that the beverage products involved were purchased from and sold by it in interstate commerce, shipments being made from and title passing at a point outside Louisiana, and that all orders for merchandise by Louisiana customers were subject to acceptance by the respondent at its executive office in New York (Compl. par. IV, Calvert R. 4; Compl. par. IV, Seagram R. 4). Jurisdiction was claimed upon the basis of diversity of citizenship and an amount in controversy in excess of $3,000.00 (Compl. par. III, Calvert R. 3; Compl. par. III, Seagram R. 3). Respondents sought a preliminary injunction re-

straining sales below the prescribed minimum prices during the pendency of the action, and a like permanent injunction upon completion of final hearing (Compl., Calvert R. 12–13; Compl., Seagram R. 12–13).

Petitioners filed answers raising, *inter alia*, the defense that respondents' course of conduct in using contracts with Louisiana retailers as a basis for fixing the prices of noncontracting Louisiana retailers violates the Sherman Act as to sales affecting interstate commerce (Answer, First Defense, Calvert R. 19; Answer, First Defense, Seagram R. 19–20).

After hearing the district court issued preliminary injunctions (Calvert R. 80; Seagram R. 77). It also filed findings of fact and conclusions of law (Calvert R. 83; Seagram R. 79). With respect to petitioners' allegation of restraint of trade by respondents, the trial court ruled that no finding was necessary in view of the Miller-Tydings Act (Concl. 2, Calvert R. 90; Seagram R. 85).

Petitioners appealed. One of the grounds of appeal urged was that the trial court had erred in holding that the Miller-Tydings Act permits price fixing in an interstate transaction as to one not a party to a fair trade contract (Calvert R. 97; Seagram R. 91). The cases were consolidated for argument (Calvert R. 100; Seagram R. 94), and the court of appeals affirmed both judgments by a divided vote. A single set of opinions was filed in the two cases (Calvert R. 102; Seagram R. 96).

ARGUMENT

I

The "non-signer" clause of the Louisiana Fair Trade Act is invalid as applied to interstate commerce unless embraced within the exemption of the Miller-Tydings amendment to the Sherman Act

It has long been settled that the Sherman Act makes it unlawful to enter into any agreement, express or implied, limiting or fixing the price at which the purchaser of a commodity may resell.[1] The bar applies even as against rights asserted under copyright (*Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *Interstate Circuit* v. *United States*, 306 U. S. 208, 221) or patent (*Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 456–457; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 250). The rule laid down by Congress thus covers the entire field of interstate and foreign commerce "except as the seller moves along the route which is marked by the Miller-Tydings Act." *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 721. See *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 296.

If the decision below remains unreversed, respondents will be able to impose a rigid price structure, not only upon retailers who consent to such an arrangement, but upon nonconsenters

[1] *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 188–189; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 721.

such as petitioners. By entering into a fair trade contract with a single retailer in a state, a manufacturer can compel compliance with the resale prices, which the manufacturer unilaterally establishes, by the thousands of retailers who have not consented to the arrangement.

If any principle under the Sherman Act can now be deemed established, it is that price fixing is unlawful *per se*.[3] Apart from the effect of the Miller-Tydings Act, it seems perfectly clear that the non-joiner provision of the state fair trade law is completely at war with the policy of the Sherman Act. "Under the Sherman Act 'competition not combination, should be the law of trade'." *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 465. "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services * * *." *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 493.

[3] *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *United States* v. *Trenton Potteries*, 273 U. S. 392; *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427; *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150; *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *Paramount Picture, Inc.*, 334 U. S. 131; *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S. 485; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211.

It may be argued that the only action complained of here is the action of the state in enacting the non-signer clause. That argument misconceives the issue. The state is not charged with violating the Sherman Act. The question is whether respondents may secure enforcement of a state law which purports to forbid price competition in an area where valid federal legislation has decreed its maintenance.[4] The problem is not one of application of the Sherman Act to a state, but of application of the Supremacy Clause of the Constitution to a state statute in a field of interstate commerce which Congress has occupied. This Court has said that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it * * *." *Parker* v. *Brown*, 317 U. S. 341, 351.[5] Here, Louisiana seeks to force adherence by all retailers to a price schedule promulgated by private persons. Apart from any exemptions created by the

[4] Even absent an express conflict, a state statute cannot survive which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67.

[5] Cf. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 345-346: "No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce."

Miller-Tydings Act, state law thus thwarts the rule laid down by Congress, since voluntary adherence to such price schedule with knowledge of like adherence by others would violate the Sherman Act. *Interstate Circuit* v. *United States*, 306 U. S. 208.

In *Parker* v. *Brown, supra,* the Court upheld as valid a raisin proration scheme operated by the state itself despite its restrictive impact upon competition in interstate commerce. But, in doing so, the Court was careful to distinguish the state program there involved from a scheme "intended to operate by force of individual agreement or combination" (317 U. S. at 350).* And the Court noted that, although the producers had a voice in the program,

> The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing

* In substance the state act provided a mechanism for a petition by producers for the establishment of a pro rata marketing plan, the holding of public hearings and making of findings by a state commission, *inter alia*, as to the reasonableness of the profits resulting from such a program, the formulation of the particular program under the supervision of the state commission, and approval of the program by it, and finally ratification of the state approved program by a certain percentage of the producers involved. 317 U. S. at 346–347.

> the conditions of its 'application.' [317 U. S. at 352.]

In *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 562, the Court took occasion to answer fears expressed in that case that application of the Sherman Act to insurance companies would necessarily invalidate state regulatory legislation in this field. The Court said:

> The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. Cf. *Parker* v. *Brown*, 317 U. S. 341, 350–352.

Thus the Court distinguished between regulatory legislation, such as that in *Parker* v. *Brown*, under which the state actively participates in the regulation, and legislation giving private interests *carte blanche* to fix prices. It plainly recognized that the latter type of legislation would contravene the Sherman Act.

If the nonsigner clause may validly be applied (apart from the Miller-Tydings Act) to interstate commerce, it would seem that the way is

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[1] This Court recently observed that "Another element in the *Parker* case which led the Court to sustain the California regulation was that it was one which the policy of Congress was to aid and encourage, and the Secretary of Agriculture had approved the State program by loans." *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 537.

open for any state to nullify the Sherman Act as to interstate transactions occurring within its borders. Thus, for example, the proscription against monopolization contained in Section 2 of the Sherman Act could be rendered ineffective by a state law providing that only one interstate seller of a given commodity would be allowed to sell in the state. The nonsigner clause, unless exempted by the Miller-Tydings Act, is an equally clear-cut example of an attempt to validate by state action what would ordinarily be a violation of federal law. The state does not undertake to exercise supervisory power over the prices established under the fair-trade contracts. It simply says that those privately established prices shall be publicly enforced. *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, establishes the constitutionality of such legislation as applied to intrastate transactions, but as applied to interstate commerce, it is plainly in derogation of the Sherman Act.[8]

II

The exemption conferred by the Miller-Tydings Act does not embrace the nonsigner clause of the Louisiana Act

A. Statutory provisions

Section 1 of the Sherman Act 26 Stat. 209, as amended by the Miller-Tydings Act, 50 Stat. 693, 15 U. S. C. 1, provides in pertinent part as follows:

[8] The *Old Dearborn* case itself recognizes that resale price maintenance in interstate commerce is unlawful under the Sherman Act (299 U. S. at 188).

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided, That nothing herein contained shall render illegal, contracts or agreements* prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when *contracts or agreements of that description* are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of *such contracts or agreements* shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful *any contract or agreement,* providing for the estab-

> lishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. * * * [Emphasis supplied.]

The Louisiana Fair Trade Act, Act 13 of 1936, La. Gen. Stat. §§ 9809.1–6, provides in pertinent part:

> SECTION 1. Be it enacted by the Legislature of Louisiana, That no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:
>
> 1. That the buyer will not resell such commodity except at the price stipulated by the vendor.
>
> 2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.
>
> Such provision in any contract shall be deemed to contain or imply conditions that such commodity may be resold without

reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

SECTION 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, *whether the person so advertising, offering for sale or selling is or is not a party to such contract,* is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. [Emphasis supplied.]

It will be observed that the exemption created by the Miller-Tydings Act (embodied in the provisos of Section 1 of the Sherman Act, *supra*) is, on its face, much narrower than the statute which, respondents claim, has been totally exempted from the Sherman Act.[9] For present

[9] The Louisiana statute is typical of that existing in 43 states. Report of the Federal Trade Commission on *Resale*

purposes the crucial difference between the Miller-Tydings exemptions and the state statute is that the non-signer provision of Section 2 of the state statute find, no counterpart in the federal Act. But since respondents contend that the Miller-Tydings Act is intended "to turn over to the state legislatures the handling of the whole problem of resale price maintenance on trade-marked commodities" (Br. in Opp. 10), it is appropriate to point out here that the federal exemption is narrower than the state statute in other respects as well. Thus it exempts only "contracts or agreements prescribing *minimum prices* for the resale" (emphasis supplied), while the state statute broadly exempts any provision that "the buyer will not resell such commodity except *at the price* stipulated by the vendor." [Emphasis supplied.] Hence, a maximum price resale provision would presumably be valid under the state law. But the fixing of maximum prices is violative of the Sherman Act (*Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211, and such price fixing would clearly not fall within the exemption of the Miller-Tydings Act unless the term "minimum" in that Act is to be read as including "maximum."[10]

Price Maintenance (1945), pp. 74–75; 2 C. C. H. Trade Reg. Serv., Pars. 7011, 7096, and 7503, *et seq.*

[10] Other differences between the two Acts may be briefly noted. Thus the second paragraph of Section 1 of the Louisiana Act makes lawful a contractual provision requiring the original vendee to require his vendee to agree to main-

With the exceptions mentioned above, the Miller-Tydings Act paraphrases almost exactly Section 1 of the state statute (see Pet. Br. 18).[11] Congress thus used language plucked from the state fair trade laws to exempt some of the activities validated as to intrastate sales by those statutes, and was silent as to other activities covered by them. In particular, the federal Act lacks any language sanctioning imposition of a rigid price maintenance structure upon non-consenting retailers. In other words, it has no non-signer provision. In these circumstances, it would seem that if respondents are to prevail they must establish either (1) that the nonsigner provision was omitted in the Miller-Tydings Act because it was surplusage in the state statute, *i. e.*, contracts under Section 1 of the state statute, standing alone, would be enforceable against strangers, or (2) that the Miller-Tydings Act was designed to include the nonsigner provision, that its omission was inadvertent, and that the omission should be judicially cured by reading the nonsigner provision into the Act.

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tain resale prices. There is no comparable provision in the Miller-Tydings Act. Again, the proviso in the Miller-Tydings Act eliminating from its coverage certain kinds of contracts is far broader than the exclusionary language in Sections 1 and 3 of the state Act.

[11] A typical state fair trade statute (Illinois Fair Trade Act) is discussed and reported in full in the report (H. Rep. 382, which accompanied H. R. 1611, 75th Cong., 1st Sess.).

The first of these alternatives is absurd on its face. Section 1 of the state statute is negative in form. It provides, with qualifications not material here, that a contract fixing resale prices of commodities shall not be deemed illegal. Such a provision could hardly be stretched by construction to operate as an affirmative requirement that complete strangers to the contract must comply with it. See dissenting opinion below (Calvert R. 110–111). The second alternative is no more persuasive. Since the Miller-Tydings Act, as far as it goes, is a paraphrase of Section 1 of the state Acts (*supra*, p. 15), the inference is inescapable that the omission of a vital provision contained in a different section of those Acts was intentional. It is inconceivable that the nonsigner provision could have been inadvertently overlooked in view of the brevity of the state statutes and of the admitted importance of the non-signer provision in the "fair trade" scheme (see Br. in Opp. 5–6). In a statute which otherwise shows the marks of careful drafting, an intention to validate non-signer clauses cannot be reconciled with a complete failure to mention them.

Respondents suggest (Br. in Opp. 5–6) that the non-signer clause is indispensable to effective price maintenance, and that the purposes of the Miller-Tydings Act will be frustrated unless that clause is given full effect. This view must rest on the premise that manufacturers are unwilling

or unable to restrict the sales of their product to wholesalers and, through them, to retailers who will voluntarily accept "fair trade" contracts because so many retailers are unwilling to enter fair trade contracts voluntarily, with the result that a resale price structure cannot be maintained without compulsion. Even if this were true, it would not follow that Congress in enacting the Miller-Tydings Act contemplated or desired the establishment of resale maintenance which could be accomplished only by legislative fiat as distinguished from consensual arrangement. The Act sanctions only "contracts or agreements." It is obvious that the non-signer clause, which imposes resale price maintenance upon all retailers if a *single retailer in a state* agrees to a fair trade contract, is aimed at price fixing by compulsion, not price fixing by agreement.

It may freely be conceded that the non-signer clause makes resale price maintenance much easier, but it does not follow that there can be no resale price maintenance without it. The manufacturer controls his product at the source and presumably can refuse to sell it to customers unwilling to enter fair trade contracts. It is true that there may be business reasons why a manufacturer may not wish to insist upon such a condition in all of his contracts. But Congress, in using the term "contracts or agreements," obviously limited resale price maintenance to those areas in which such agreements are obtain-

able. Had Congress desired to eliminate the trouble and inconvenience of securing consent to fair trade agreements, it would no doubt have simply authorized resale price fixing by the manufacturer of any commodity sold by him bearing a trademark or trade name.

The position of the Government, simply stated, is that the Miller-Tydings Act means neither more nor less than what it says.[11a] By its terms, the Act removes the bar of the Sherman Act as to the specified voluntary contracts or agreements and does nothing more. A state statute providing that strangers to a resale price maintenance contract—comprising almost all the retailers in a state—are to be bound by its terms if one or a few retailers can be induced to accept it, goes far beyond the approval of voluntary arrangements; it establishes a system of private price fixing backed by the coercive authority of the state. It is not within the *terms* of the Miller-Tydings Act, and, we submit, is not to be read into the Act upon the basis that it is within the *purposes* of the Act.

B. Legislative history

Both the majority and the dissenter below regarded reference to the legislative history of

[11a] See *62 Cases, More or Less* v. *United States*, decided March 26, 1951, No. 363, this Term, 19 Law Week 4187, 4188, where the Court stated "our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."

the Miller-Tydings Act as unnecessary to decision of this case. In the particular circumstances there is much to be said for that view. It is hard to conceive of any evidence of intentions of the proponents of the legislation which would be strong enough to justify judicial addition of a non-signer clause exemption where it must have been deliberately omitted by Congress. Assuming, *arguendo,* that the purpose of the sponsors of the Miller-Tydings Act was to give the states *carte blanche* in the price maintenance field, or even specifically to validate existing state "fair trade" legislation as applied to interstate commerce,[12] it is obvious that the statute Congress enacted stopped short of achieving such a result. There may be, and often is, a disparity between the hopes of the sponsors of legislation and the statute finally enacted. *United States* v. *New York Central R. Co.,* 263 U. S. 603, 610.

In fact, the legislative history does not reflect any clear-cut intention to relinquish to the states unrestricted authority in this field. As the review which follows indicates, the most that can be urged from the legislative history of the Miller-Tydings Act is that some members of Congress thought that the bill would validate state fair trade legislation generally, or that nonsigner

[12] See, *e. g., Pepsodent Co.* v. *Krauss Co.,* 56 F. Supp. 922, 927 (E. D. La.) where it was stated that the Act's purpose was to "remove every obstacle which would hinder the free enforcement by the states of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit."

clauses would be validated, and some opponents of the legislation feared that its enactment would validate the nonsigner provisions. On the other hand, there are numerous expressions of the opinion that the only effect of the Act would be to validate voluntary contracts.

The earlier legislative history has been rather extensively reviewed in the brief for petitioners (Appendix E. Pet. Br. 66–74). That review indicates that in general the state fair-trade acts were closely patterned after unsuccessful bills introduced in earlier Congresses, but that the nonsigner clause of the state fair-trade acts was an innovation which first appeared as an amendment to the California act in 1933, and was not based on any of the prior federal bills. On the other hand, the early abortive federal bills which contained no nonsigner clause were in substance carried over into the Miller-Tydings Act without the addition of any provision purporting to relate to nonsigners, such as the states had in time adopted.

The Miller-Tydings bill originated in the Seventy-Fourth Congress, where it passed the Senate (80 Cong. Rec. 8433) but was not reported out of committee in the House. In the Seventy-Fifth Congress similar bills (S. 100, 81 Cong. Rec. 66; H. R. 1611, 81 Cong. Rec. 34) were reported out by the judiciary committees of both houses (S. Rep. 257; H. Rep. 382; 75th

Cong., 1st sess.) but were not debated or acted upon. Instead the bill was attached by the Senate Committee on the District of Columbia as a rider to the District of Columbia revenue bill (H. R. 7472, S. Rep. 879, 75th Cong., 1st Sess.). In this form it was debated and passed by the Senate (81 Cong. Rec. 8137–43, 8166–68).

The pertinent committee reports, which are generally the most important portions of the legislative history of a bill, are Senate report in the Seventy-Fourth Congress (S. Rep. 2053), the Senate report in the Seventy-Fifth Congress (S. Rep. 257), which incorporated Report 2053, the Senate report on the District of Columbia revenue bill (S. Rep. 879), which merely quoted the prior reports, and the House report on H. R. 1611 (H. Rep. 382, 75th Cong., 1st sess.). The Senate majority reports make no mention of the nonsigner provision in the state laws or of the effect of the proposed bill upon persons not parties to the contracts or agreements. The state laws to be validated were referred to as not being "general price-fixing acts" but as merely "legalizing * * * contracts," as being "merely permissive." S. Rep. 2053, p. 2. This report declared:

> S. 3822 removes the doubt as to the applicability of the Sherman Act by expressly legalizing *such contracts* where legal under the laws of the State where made or where they are to be performed.
>
> * * * * *

> The State acts are *in no sense general price-fixing acts;* they merely authorize a manufacturer or producer to enter into *contracts* for the maintenance of his price, but they do not compel him to do so. In other words, *they are merely permissive.* [Emphasis supplied.]
>
> * * * * *
>
> But most important, from the standpoint of the Congress, the proposed bill merely permits the individual States to function, without Federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the State laws.
>
> In other words, the bill does no more than to remove Federal obstacles *to the enforcement of contracts* which the States themselves have declared lawful. [Emphasis supplied.]

The only reference in the Senate reports to the non-signer clause was contained in the minority views of Senator King, an opponent of the bill, who indicated that he thought that the bill would validate them. S. Rep. 879, Part 2, p. 6. Senator King's statement quotes a letter from the President, enclosing a letter to him from the Chairman of the Federal Trade Commission, sent to the Senate in opposition to S. 100. 81 Cong. Rec. 3838, S. Doc. 58, 75th Cong., 1st Sess.; Pet. Br. 82, n. 74. The Federal Trade Commission letter expresses the belief, or the fear, that the Miller-Tydings Act would allow the enforcement of non-signer clauses in state acts.

The House report on H. R. 1611 (H. Rep. 382, 75th Cong., 1st Sess., p. 2) was in general also phrased in terms of legalizing contracts. It said in its "General Statement" (p. 2):

> The sole objective of this proposed legislation is to permit the public policy of States having "fair trade acts" to operate with respect to interstate contracts for the resale of goods within those States. The fair-trade acts referred to legalize the maintenance, *by contract,* of resale prices of branded or trade-marked goods which are in free competition with other goods of the same general class. [Emphasis supplied.]

And in the succeeding paragraph, the effect of the reported bill is stated to be to legalize "contracts prescribing minimum prices or other conditions for resale" of goods under certain conditions. *Ibid.*[13] This report, however, in describing the state laws did advert to the nonsigner provision,[14] and also quoted the Illinois Act in full.

These committee reports, though revealing some awareness of the nonsigner clauses in state

[13] The additional views of Representative Celler, who did not oppose the bill, also fail to discuss the present question. Representative Celler apparently feared that the "other conditions", permitted in that version of the bill, might legalize tying arrangements. *Id.*, p. 6. He was aware that many state acts contained nonsigner clauses, and that their constitutional validity had been sustained in the *Old Dearborn* case, *supra*, H. Rep. 382, 75th Cong., 1st Sess., p. 24.

[14] The House report noted that under state fair trade laws "third parties with notice are bound by the terms of such a contract" (p. 2).

laws, fail to show any congressional intention that the federal statute should exempt state non-signer clauses from the provisions of the Sherman Act. The repeatedly stated purpose of the federal legislation was to legalize, to permit the enforcement of, contracts. Certainly the reports do not manifest any intention to permit a manufacturer to fix prices, for persons who had not signed contracts, in a clear enough manner to put Congress on notice that the proposed bill was to go a great deal further in that direction than anyone could gather from its language.

The debate on the floor of Congress is not dissimilar, except for a single statement by Representative McLaughlin noted below. The first discussion in the Senate of S. 3822 was a statement by Senator Tydings, in response to a request for an explanation by Senator McKellar (80 Cong. Rec. 8433). Senator Tydings mentioned that twelve states have passed—

> acts within their States regulating loss-leader selling and the making of contracts between a manufacturer and a distributor of an article * * * [S. 3822] simply backs up the action of those States * * *.

In the debate in the succeeding session, referring to the amendment to H. R. 7472, Senator Tydings made the following statement (81 Cong. Rec. 7495):

> What does the amendment do? It permits a man who manufactures an article

> to state the minimum resale price of the article in a contract with the man who buys it for ultimate resale to the public, provided * * *.[15]

At no time did Senator Tydings mention the nonsigner clause or its effect upon persons not parties to the contracts. His statements as a whole would certainly leave the impression that he was referring only to voluntary agreements.

Senator King, opposing the bill, repeated the substance of his minority committee report which indicated his awareness that several state price-maintenance laws contained nonsigner clauses, and expressed his opinion, or fear, that the Miller-Tydings Act would permit price fixing in those states.[16] He again quoted the letter from

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[15] Insofar as it reflects Senator Tydings' attitude toward the proposed legislation as permitting price fixing by statute, the following statement is material (81 Cong. Rec. 7496): "I have never voted for a price-fixing bill in my life so far as I can recall."

[16] Senator King said (81 Cong. Rec. 7491): "If the rider [the Miller-Tydings Act] is adopted and becomes law, it will permit manufacturers and distributors in New York, for instance, to enter into contracts with retailers in California, and fix and maintain retail prices, though monopolies in the commodities referred to might result. And I might add that in California and other States it has been held that if the retail vendee gives notice to the public of his price-fixing contract with the distributor or manufacturer in New York no other person in the State may sell the commodity at a price below that fixed in such contract."

These decisions, of course, did not apply to the validity of nonsigner clauses with reference to interstate commerce.

the Chairman of the Federal Trade Commission, referred to above.

Perhaps the most apt characterization of the Senate debate was Senator Vandenberg's statement (made generally and not in connection with the point here at issue) (*id.* at 7492): "Regardless of the merits of this amendment, it is perfectly obvious that not 5 percent of the membership of the Senate will know anything whatever about the amendment when the Senate votes upon it."

The House debates upon H. R. 7472 are scarcely more conclusive. Representative Culkin, who favored the amendment, commented that its effect would be to "make legal what was condemned by the Supreme Court in 1910 in the case of *Dr. Miles Medicine* [sic] *Co.* v. *Parks* [sic] *& Sons Co.* (220 U. S. Rep. 373) * * * such price-fixing acts supplemented by this legislation will write into law the minority opinion of Mr. Justice Holmes * * *." 81 Cong. Rec. 8139–8140. The *Dr. Miles Medical* case arose long before the general enactment of "fair trade" acts, and was decided twenty-three years before California enacted the first nonsigner clause. If, as Representative Culkin said, the purpose of the Miller-Tydings Act was to overturn this decision, the Act would have no relation to nonsigner clauses.

One member of the House, Representative McLaughlin, a member of the Judiciary Com-

mittee which had reported H. R. 1611, clearly expressed the opinion that the Act would authorize the enforcement of nonsigner clauses with respect to interstate commerce. 81 Cong. Rec. 8140–8141, 8142, quoted in full Pet. Br. 91, n. 98. In the course of his statement, however, he also made remarks as to the voluntary nature of the arrangement being authorized which are not consistent with the interpretation of the bill as validating the nonsigner clauses. Thus he said (81 Cong. Rec. 8141):

> H. R. 1611 is in no sense a price-fixing statute * * *. It is entirely a permissive act. It merely allows the seller and buyer * * * to contract for resale of goods according to the State law, if they want to do so. It does not compel the buyer and seller to enter into the contract but only authorizes them to do so if they so desire.

Despite the one clear statement by Representative McLaughlin, the debate as a whole does not manifest any uniform understanding of the problem on the part of the House sufficient to warrant giving the Act a construction plainly at variance with what it says.

Our search of legislative history has discovered no other comments on the question at issue in this case. Given their greatest weight, the few references to the nonsigner clause would hardly be enough to support construing the statute as applicable to subjects other than those mentioned

in the law itself. The Miller-Tydings Act provides merely that the antitrust law shall not render illegal "contracts or agreements prescribing minimum prices," etc., when such "contracts or agreements" are lawful under state law. Nothing in the history of the Act justifies a distortion of this plain language so as to immunize not only the "contracts or agreements" themselves but also a mandatory requirement of state law that persons not parties to such agreements, who could not be persuaded to sign them voluntarily, must nevertheless comply with any agreement made with any other person in the state.

CONCLUSION

For the foregoing reasons, the nonsigner clause of the Louisiana Fair Trade Act is in conflict with the Sherman Act and is not validated by the Miller-Tydings Act. The judgments should be reversed.

Respectfully submitted.

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APRIL 1951.

U. S. GOVERNMENT PRINTING OFFICE: 1951

LIBRARY
SUPREME COURT, U.S

Office-Supreme Court, U. S.
FILED
MAR 28 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 442.

SCHWEGMANN BROTHERS, *et al.*,
Petitioners,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443.

SCHWEGMANN BROTHERS, *et al.*,
Petitioners,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS AND BUREAU OF EDUCATION ON FAIR TRADE, INC., *AMICI CURIAE.*

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Opinion Below.

The opinion of the United States Court of Appeals, 5th Cir. (Seagram, R. 96, *et seq.*; Calvert, R. 102, *et seq.*) is reported in 184 F. (2d) 11.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Statutes Involved.

The pertinent statutes are the Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, Sec. 1, 26 Stat. 209, 15 U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) and the Louisiana Fair Trade Act (Act 13 of 1936, La. R. S. 51:391-396).

These statutes are set forth in the Appendix.

Question Presented.

The question presented is this: Where a manufacturer has an agreement with a retailer establishing a minimum selling price for the manufacturer's product pursuant to the Louisiana Fair Trade Act and the Miller-Tydings Amendment, and a retailer who has signed no such contract has sold the product at less than such minimum price, will such manufacturer be denied injunctive relief because despite said two acts, the granting of relief would be in violation of Section 1 of the Sherman Law?

The Interest of *Amici Curiae*.

The National Association of Retail Druggists has an active membership of thirty-five thousand independent retail druggists and, with the affiliate membership consisting of state and county groups, represents an aggregate number

of fifty-two thousand independent retail drug store owners in the United States.

The Bureau of Education on Fair Trade is a non-profit organization, established under the auspices of The National Association of Retail Druggists, and administered by a committee comprised of representatives of manufacturers, wholesale distributors, and independent and chain store retailers of nationally advertised trade-marked products. Its purpose is to develop public understanding of Fair Trade.

Statement of Salient Facts.

Both respondents sell trade-marked brands of whiskeys and gins to wholesalers in the State of Louisiana, who, in turn, sell them to local retailers in that state for re-sale to the consuming public. Respondents do not sell directly to retailers. The petitioners, residents of Louisiana, are members of a commercial partnership operating a supermarket in New Orleans, where they sell liquor at retail.

Pursuant to the Louisiana Fair Trade Act, respondents separately and independently entered into contracts with numerous retail liquor dealers in Louisiana, which provide minimum prices for the resale of respondents' branded commodities at retail. Petitioners were duly notified, pursuant to the provisions of the Louisiana Act, of the prices established by the contracts just referred to. Despite such notification, petitioners wilfully and knowingly sold, at retail, to the consuming public, commodities bearing the trademark of respondents, at prices below the minimum retail prices established by the respondents.

The District Court enjoined such further sales, and its decree was affirmed in the Court of Appeals.

Summary of Argument.

The argument is summarized in the following points:

POINT I.

All that was required to make all of the provisions of the State Acts enforceable was an Act of Congress exempting the contract between the manufacturer and retailer from the provisions of the Sherman Law.

POINT II.

If it be assumed, contrary to the reasoning set forth in Point I, that it was necessary for Congress to exempt the "non-signer" provisions of the State statute from the provisions of the Sherman law, the legislative history and underlying purpose of the Miller-Tydings amendment establish that such amendment must be construed to have effected such exemption.

The State of the Law Prior to the Miller-Tydings Act and the Need for Federal Legislation to Make the State Fair Trade Acts Effective.

The state of the law prior to the enactment of the Miller-Tydings Act was such that it was deemed desirable to remove any doubts as to whether the state fair trade acts, all of which contain the non-signer provision, would be enforceable in the light of the provisions of the Sherman Act as interpreted by this Court.

Before pointing out the state legislation which preceded the Miller-Tydings Act, and the reasons which were

stated for its enactment, it may be helpful to indicate very briefly the state of the law as to the legality of resale price maintenance contracts under the Sherman Law and prior thereto.

Prior to the Sherman Law resale price maintenance of identified goods by "vertical" agreement among producers, vendees and sub-vendees, was generally recognized as valid. *Fowle* v. *Park*, 131 U. S. 88.

Even after the adoption of the Sherman Law, many lower Federal courts held that such arrangements were valid. See *Old Dearborn Distributing Co.* v. *Seagram Co.*, 299 U. S. 183, 188. However, in a series of decisions beginning in 1908, this Court held that the establishing of minimum resale prices by vertical agreement was an unreasonable restraint of trade under the Sherman Act (e.g., *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373), and an unfair method of competition within the meaning of Sec. 5 of the Federal Trade Commission Act (38 Stat. 719). *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441.

The decisions in *Dr. Miles* and similar cases were not the uniform views of this Court, because Mr. Justice Holmes and Mr. Justice Brandeis vigorously dissented from rulings which held vertical resale price maintenance by producers unlawful under Federal law. See dissenting opinion of Mr. Justice Holmes in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 409 and of Mr. Justice Holmes, Mr. Justice Brandeis concurring, in *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 456. See, also, the article by Mr. Justice Brandeis prior to his becoming a member of this Court in *Harper's Weekly*, Nov. 15, 1913, entitled *"Cut-Throat Prices. The Competition That Kills"*.

In 1931, the first fair trade statute was adopted in California.* This statute was ineffective because it contained no "non-signer" clause (Federal Trade Commission, *Report on Resale Price Maintenance* (1945) pp. 67-8) and it was amended in 1933** by the addition of such clause. From that time until this Court's decisions in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corporation*, 299 U. S. 183, and *Pep Boys* v. *Pyroil Sales Co.*, 299 U. S. 198, on December 7, 1936, eleven other States enacted fair trade acts. Those cases held that state statutes substantially the same as that here involved did not violate the "due process" or "equal protection" clauses of the Federal Constitution.

At the time of the enactment by Congress of the Miller-Tydings Act in August 1937, 42 states had enacted fair trade acts similar to the act here involved.

The Committee reports in Congress show that there was doubt after the decision of this Court in the *Old Dearborn* case as to whether the state fair trade acts violated the Sherman law.

The House Judiciary Committee,† in reporting on H. R. 1611, the January 1937 Bill, stated in House Report No. 382, 75th Congress, 1st Session, page 2:

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* Cal. Laws 1931, c. 278.

** Cal. Laws 1933, c. 260.

† In January 1937, shortly after the decision in the *Old Dearborn* case, Representative Miller and Senator Tydings introduced virtually identical bills from which the Miller-Tydings Amendment was derived (H. R. 1611 and S. 100, 75th Cong., 1st Sess.). Committees of the Senate and the House reported favorably on both these bills but they were not voted upon (House Rep. No. 382; Senate Rep. No. 257).

In June 1937, the House passed an appropriation bill for the District of Columbia (H. R. 7472, 75th Cong. 1st Sess.). When the appropriations bill came to the Senate, the Committee on the District of Columbia added thereto a rider which was substantially the same as the independent Miller and Tydings bills introduced

"In view of the decision of the Supreme Court, in *Dr. Miles Medical Company v. Park & Sons Co.* (220 U. S. 373), and other cases, it is doubtful, at least, that such contracts are now valid in interstate commerce."

So, too, the report of the Senate Committee on the Judiciary on S. 100 (the companion bill to H. R. 1611), which was incorporated by the Senate Committee on the District of Columbia in its report on the District of Columbia Appropriations Bill (H. R. 7472), expressed doubt as to whether the Sherman Act would make the local fair trade acts unenforcible. This Senate Committee report said (Senate Report 257, 75th Cong., 1st Sess., page 2):

"Though there is no specific adjudication on the subject, it is believed that contracts stipulating minimum resale prices, even when they are made or are to be performed in a State where such contracts are lawful, may violate the Sherman Act whenever the goods sold under the contract move in interstate commerce.

"Consequently, many manufacturers not domiciled in the State of the vendee are unwilling to run the risk of violating the Federal law, and the effectiveness of the State fair-trade laws is thereby seriously impaired.

"S. 100 removes the doubt as to the applicability of the Sherman Act by expressly legalizing such contracts where legal under the laws of the State where made or where they are to be performed."

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in January (Senate Rep. No. 879). That rider (with an amendment added on the Senate floor expressly making it inapplicable to "horizontal combinations") was accepted by both Houses of Congress and was enacted as a part of the District of Columbia appropriation bill. So much of that bill as amended Section 1 of the Sherman Law is generally referred to as the Miller-Tydings Amendment.

A fuller statement of the legislative history of the Amendment appears in Judge Borah's opinion in *Pepsodent Co.* v. *Krauss Co.*, 56 F. Supp. 922.

The foregoing quotations from the committee reports indicate the existing doubt as to the impact of the Sherman Law on the state fair trade acts, despite the decision in the *Old Dearborn* case. Accordingly, Congress in August 1937 in order to effectuate the validity and enforcement of state fair trade contracts and remove possible conflict of such state acts with the Sherman Act, enacted the Miller-Tydings Act to amend Section 1 of the Sherman Anti-Trust Act.

POINT I.

All that was required to make all of the provisions of the State Acts enforceable was an Act of Congress exempting the contract between the manufacturer and retailer from the provisions of the Sherman Law.

If the Miller-Tydings Amendment be construed as narrowly as the petitioners contend, then, nevertheless, it appears that the exemption of the contract between manufacturer and retailer from the provisions of the Sherman Act was all that was necessary to make the state fair trade acts wholly effective. Only one question possibly may have been left open by the decisions of this Court in the *Old Dearborn* and *Pep Boys* cases, decided before the enactment of the Miller-Tydings Amendment. That was whether the *initial step* required under the plan of the state acts, to wit, the contract between manufacturer and retailer establishing a minimum resale price, was a violation of the Sherman Law.

The non-signer who sells to the consumer at less than the minimum price established is not a party to (in the language of the Sherman Law) any "contract", "combination" or "conspiracy". The cause of action of the re-

spondents, while predicated upon the existence of a contract which is now legal because exempted from the Sherman law, is one created by the state in section 2 of the Louisiana Act through the valid exercise of the state's police power, as expressly upheld in the *Old Dearborn* case. That cause of action is in tort for unfair competition.

The foregoing analysis of the basis of the respondent's cause of action is clearly stated in *Miles Laboratories* v. *Seignious*, 30 F. Supp. 549 (E. D., S. C.). In that case injunctive relief was sought against a non-signer under a South Carolina statute identical with the Louisiana statute. The attack upon the statute was, among other reasons, based upon the due process clause of the State Constitution. The Court discusses the *Old Dearborn* case, and then makes the following statement with respect to the basis of the right of the plaintiff at pages 555 and 556:

> "The attack under the due process clause (Article 1, Section 5) has been abandoned by the defendant. The original contention was that there was a violation of this clause because the statutes made the contracts signed by the plaintiff with third parties applicable to the defendant who had not signed any such contract. *Clearly this was an erroneous assumption, because it is not under the contracts that the plaintiff asserts the right to protect its products from price-cutting, but it is under the statute. It is seeking to enforce a statutory right, and not a contract right. The contracts made with third parties merely establish a minimum price, and no other term of such a contract is applicable to a person who has not signed it. The minimum price so established is applicable to all persons whom the statute, in its statewide application, can reach.*"*

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* Emphasis throughout is supplied.

While the foregoing statement was made with respect to the application of the due process clause, it is equally applicable to the question here presented in that it clearly shows the source of the rights of the respondents here.

The brief *amicus* filed by the Solicitor General in support of the petition for *certiorari* in the instant case states (p. 3):

> "A state may not 'give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' *Parker* v. *Brown*, 317 U. S. 341, 351."

The case at bar is not one where the state has purported to grant any "immunity to those who violate the Sherman Act." The only "contract", "combination" or "conspiracy" in the case at bar is expressly exempted by the Miller-Tydings amendment. All that remains, of which petitioners complain, is the imposition on them of a statutory liability for unfair competition. This liability (i. e., as expressed in the decree of the District Court below) is solely the product of the state's exercise of its police power, and is a state action to which the Sherman Act does not apply. See *Parker* v. *Brown*, 317 U. S. 341, 352.

It appears therefore that the cause of action asserted against the petitioners is in no wise affected by the provisions of the Sherman law, but, on the contrary, is predicated on the existence of a valid contract between producer and retailer which the State Act uses as the means for the valid exercise of its police power. As stated in the majority opinion below (184 F. 2d at p. 15):

> "In this state of the law, proponents of, and protagonists for, the fullest scope for state fair trade statutes needed only the passage of a federal act relieving price maintenance contracts from the prohi-

bitions of the Sherman Act. They did not need to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power, indeed in complete derogation of it, to do so. For the power to enact state fair trade laws derives not from the Congress, but from the inherent powers of the states."*

Apparently the dissenting opinion below reaches the conclusion that an injunction should not have issued for the following reason (184 F. 2d at p. 17):

> "It is not material whether the defense be declared predicated upon the lack of State power, or upon the ground that the enforcement of a State statute will result in a Federal Court of Equity basing the exercise of its injunctive power upon grounds which are illegal because of the Sherman Act. The result properly to be reached is the same, for the Federal Court must not require action which

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* The question presented in this case was also decided adversely to the petitioners' contention by the New York Court of Appeals in *Calamia* v. *Goldsmith Bros. Inc.*, 299 N. Y. 636 (1949). There the Court of Appeals affirmed a judgment for the plaintiff which granted an injunction against a non-signer. The appellant had argued that the Miller-Tydings Amendment "did not give any right of action against such non-signatories." The Court affirmed the decision below without opinion. Upon motion made to amend the remittitur (299 N. Y. 795) to the court below, the Court of Appeals amended its remittitur by adding the following:

> "'The following question under the Constitution and laws of the United States was presented and necessarily passed upon: "Whether Article 24-A of the General Business Law is inconsistent with the Miller-Tydings Amendment to the Sherman Act (U. S. Code, tit. 15, § 1) if construed to permit suits by non-signatories and against non-signatories of 'fair trade' contracts relating to commodities in interstate commerce". This Court held such construction of Article 24-A of the General Business Law of New York to be consistent with the Constitution and laws of the United States.'"

Despite this amendment, no appeal was prosecuted to this Court.

countenances conduct contrary to Federal law. In the present case, the Court could enforce section 1 of the Louisiana Act, but could not enforce that part of section 2 relating to non-contractors if, under the circumstances, such enforcement would be contrary to the Sherman Act."

The fallacy of this reasoning lies in the fact as shown above that the enforcement of Section 2 of the Louisiana Act will not result in a Federal court of equity basing the exercise of its injunctive power upon grounds which are illegal because of the Sherman Act. As pointed out above, the immunization of contracts entered into under Section 1 of the Louisiana Act by the adoption by Congress of the Miller-Tydings Amendment leaves nothing in the case at bar to which the prohibitions of the Sherman Act might apply.

POINT II.

If it be assumed, contrary to the reasoning set forth in Point I, that it was necessary for Congress to exempt the "non-signer" provisions of the State statute from the provisions of the Sherman law, the legislative history and underlying purpose of the Miller-Tydings amendment establish that such amendment must be construed to have effected such exemption.

It has been shown in Point I that the only action required by Congress to make the State Act wholly effective, was the exemption of the contract between the manufacturer and retailer from the provisions of the Sherman Law. Nevertheless, it now will be shown that the Miller-Tydings Amendment must be construed to have intended to leave to the states the right to effectuate their own policy

with regard to their own affairs, and particularly the right to enjoin non-signing retailers from selling at less than the minimum price when notified of the contract between the wholesaler and the retailer.

Preliminarily, it may be pointed out that if it were held, as petitioners contend, that the amendment should be construed to exempt only the contracts between manufacturers and retailers, and that a further exemption is required to make Section 2 of the State Act effective, then the Miller-Tydings Act was a mere futile enactment. This petitioners admitted in their main brief below, for they state (p. 6):

> "It should be pointed out that a decision favorable to appellants will cripple, if it will not kill the Miller-Tydings Act. If the Miller-Tydings Act is limited, as the act itself says, to validating fair trade contracts but has no application to price-fixing imposed upon non-contracting parties, fair trade statutes will be deprived of effectiveness in transactions affecting interstate commerce."

That Congress knew of all the provisions of the State Acts and intended to make all such provisions wholly effective, appears from the Committee reports and statements on the floor of Congress. Nowhere is there the slightest intimation that Congress intended other than to validate *the entire plan* set forth in the State Statutes. On the contrary, it appears clearly that that was understood to be the effect of the Miller-Tydings Amendment.

In House Report No. 382, 75th Congress, 1st Session (March 11, 1937), the Committee on the Judiciary in reporting on the Bill, H. R. 1611, stated at page 2 thereof:

> "State fair trade acts typically provide, first, that contracts may lawfully be made which provide for

maintenance by contract of resale prices of branded or trade-marked competitive goods. *Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.*"

The Illinois statute, including the non-signer clause, is then quoted in full, with the statement that the statute was recently held constitutional in the *Old Dearborn* case.

At page 3 the Committee adds the following:

> "Your committee respectfully submit that sound public policy on the part of the Federal Government lies in the direction of lending assistance to the States to *effectuate their own public policy* with regard to their internal affairs. It is submitted that this is especially true where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of the power over interstate commerce by the States to the Federal Government."

In the Senate, the Committee on the District of Columbia, in reporting (Senate Report No. 879, 75th Congress, 1st Session July 6, 1937) on the Miller-Tydings amendment which the Committee added as a rider to the House Appropriations Bill, incorporated the report of the Committee on the Judiciary on the independent Tydings Bill (S. 100), and stated that this report was also applicable to the provisions of the Miller-Tydings Amendment. At page 6, in the report as incorporated, the Committee said:

> *"The Congress is not called upon to pass upon the effectiveness of the remedy, but it should not put obstacles in the way of efforts of the individual States to make the remedy effective.*

* * * * * *

"But most important, from the standpoint of the Congress, the proposed bill merely permits the individual States to function, without Federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the State laws.

"In other words, the bill does no more than to remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful."

The Minority Views which appear as Part 2 of the same Senate Report, No. 879, on page 3 thereof, incorporate a letter from the Chairman of the Federal Trade Commission addressed to the President under date of April 14, 1937, which letter the President had transmitted to the Senate on April 24, 1937 (81 Cong. Rec. 3838, Sen. Misc. Doc. No. 58). In that letter, the Chairman states, among other things, in commenting on S. 100:

"A peculiar feature of many of the State laws which would, under a recent decision of the Supreme Court, speaking through Mr. Justice Sutherland (57 S. Ct. 147), *thus** be made binding upon interstate commerce is that they require wholesalers and retailers to conform to the provisions of private resale price maintenance contracts to which they are not parties. Thus, a private contract, the provisions of which are determined without public hearing and apart from any public supervision as to reasonableness, is made binding upon all dealers and the consuming public."

When the Senate rider to the District of Columbia Appropriations Bill was debated in the House following the Conference Committee's Report, Representative McLaughlin referred to the deliberations of the Judiciary Committee, of which he was a member, on the similar January, 1937

* *i.e.*, By the enactment of the Miller-Tydings Amendment.

bill. He said that the Committee, prior to its favorable report on said bill, had considered and rejected certain objections thereto (81 Cong. Rec. 8142). He then stated:

> "However, in order to present the matter fully to the House, these objections should be referred to. These objections are:
>
> "First. That H. R. 1611, if enacted, would impose a penalty upon a seller of merchandise for selling such merchandise below the minimum price agreed upon in a contract to which he is not a party.
>
> • • • • • •
>
> "The objections were overruled by the committee after a consideration of the testimony bearing upon them and after full discussion of the objections.
>
> "The first objection, namely, that H. R. 1611, if enacted, *will permit resale contracts to be binding upon parties other than the parties to the contract itself*, is fully answered by the statement that *the respective State laws make provision that the contract shall be binding upon all those who sell the trade-marked article* which is the subject of the resale contract whenever the person selling the article below the contract resale price does so willfully and knowingly. This argument is *well answered by the controlling opinion of the Supreme Court of the United States in the case of Old Dearborn against Seagram, supra*, upholding the validity and constitutionality of the Illinois State Fair Trade Practice Act, * * *.
>
> • • • • • •
>
> "Further complete answer to this objection is that the respective States in the exercise of their wisdom and judgment imposed the penalties provided in the respective State acts. The bill before us today, if enacted, merely *makes effective the law*

> *which has been enacted by the respective State legislatures* to govern transactions within their own borders."

Finally, Senator Tydings, in speaking in favor of the Bill, said (81 Cong. Rec. 7496):

> "What we have attempted to do is what 42 states have already written on their statute books. It is simply to back up those acts, that is all; to have a code of fair trade practices written not by a national board such as the N. R. A. but by each State, so that the people may go to the State legislature and correct immediately any abuses that may develop."*

In the light of all of the foregoing, it is idle to argue, as do the petitioners, that Congress was not fully conversant with the provisions of the State Acts and specifically with the provisions of Section 2 which gave a remedy against a non-signer. *From the foregoing quotations it also appears that, having exempted the contract between the wholesaler and retailer from the provisions of the Sherman Law, the intention was to leave to the states the extent to which such exempted contract might be made operative against a non-signing retailer, who, with knowledge of the contract, nevertheless sold below the minimum price established thereby.*

Furthermore, it is obvious from the reports that the Congress was familiar with the decision in the *Old Dearborn* case, wherein the Court discussed at length the provisions with respect to the liability of a non-signer and found that that provision did not violate the "due process" or "equal protection" clauses of the Federal Constitution.

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*For further evidence of Congressional knowledge that adoption of the Miller-Tydings Amendment would validate the State "non-signer" clauses, see statement of Senator King speaking in opposition to the rider to H. R. 7472 (81 Cong. Rec. 7491).

The petitioners argue that because the Miller-Tydings Amendment simply refers to "contracts or agreements prescribing minimum prices," the non-signer provision must be deemed still to be subject to the prohibitions contained in the Sherman Law. However, as shown, the statute and its history make evident that Congress intended to make the whole state law effective, and, as above stated, the petitioners concede that the construction they contend for would make the Amendment wholly futile. Hence, to impute to Congress the intent to make *only a part* of the statute effective, although that part is entirely dependent for its effective operation upon the rest of the statute, is to attribute to Congress an absurd and futile gesture.

The statutory rules of construction followed in this court indicate that the absence of an express validation of Section 2 is immaterial, provided it appears that the validation was essential to accomplish the underlying purpose of the act, namely, the making of the state statutes effective. The omission is immaterial for two reasons; (1) the intention of Congress being clear, that intention will be carried out; (2) the non-signing retailer and the consumer purchasing from him were not parties to any contract combination or conspiracy, and the Sherman Act, accordingly, could not have any relation to violation of the state statute by the non-assenter, and to the purchase from him by the ultimate consumer.

In *U. S.* vs. *American Trucking Associations, Inc.*, 310 U. S. 534, 543, this Court stated:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or*

> *futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."* (Citing many cases in footnotes.)

The policy which requires the Courts to give weight to the statutory purpose is particularly compelling where the purpose of a federal statute is to give express validity to a state enactment, even where the federal statute is not, as here, an enabling act. The policy was stated by this court as follows in *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85:

> "The rule applicable is clearly stated in *Illinois Central R. Co.* v. *Public Utilities Comm'n*, 245 U. S. 493, 510: 'In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.' We have frequently applied that principle. See e. g. *Reid* v. *Colorado*, 187 U. S. 137, 148. *Missouri Pacific Ry. Co.* v. *Larabee Mills Co.*, 211 U. S. 612, 621, *et seq.* *Missouri, K. & T. Ry. Co.* v. *Harris*, 234 U. S. 412, 418-419. *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 139. *Northwestern Bell Tel. Co.* v. *Nebraska Ry. Comm'n*, 297 U. S. 471, 478. *Kelly* v. *Washington*, 302 U. S. 1, 10, *et seq.*"

From the foregoing it appears that there is no basis for the contention that Congress intended to exempt from the Sherman Law only section 1 of the State Statutes.

It should be added that there have no doubt been diverse views as to the wisdom and effectiveness of the State Fair

Trade Acts both before and since the enactment of the Miller-Tydings Amendment. But it is important to note that although fourteen years have elapsed since the enactment of that Amendment in 1937 and eighteen years have elapsed since the "non signer" provision first appeared in 1933 in the California Act not a single act has been repealed. Furthermore, the courts of last resort of every State (except Florida) where the question has arisen, have held the state acts constitutional.*

Finally, attention should be called to the following statement of this court in the *Old Dearborn* case:

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. *True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies.* We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative

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* In Florida, the first act was held unconstitutional because of insufficient title. *Bristol-Myers Co.* v. *Webb's Cut Rate Drug Co., Inc.*, 137 Fla. 508, 188 So. 91. The second act was held unconstitutional upon the ground that, although it was held by this Court that such acts did not contravene the Federal constitution, they did nevertheless violate the provisions of the Constitution of Florida as to which the State Court was the final arbiter. *Liquor Stores, Inc.* v. *Continental Distilling Corp.*, 40 So. 2d 371. A third act has been passed.

The decisions of the various State Courts are collected in *Sears* v. *Western Thrift Stores of Olympia*, 10 Wash. (2) 372, 380-86; 116 P. 2d 756, 760-63.

determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned" (299 U. S. at p. 195).

CONCLUSION.

The judgments of the Court of Appeals should be affirmed.

Respectfully submitted,

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Appendix.

Statutes Involved.

A.

The pertinent provisions of the Louisiana Fair Trade Act (Act 13 of 1936, La. R. S. 51:391-396) are as follows:

> "Section 1. Be it enacted by the Legislature of Louisiana, That no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract: * * *"
>
> "Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.
>
> "Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices."

* * *

B.

The Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, §1, 26 Stat. 209, 15 U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) (amendment italicized):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.* Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 442.

SCHWEGMANN BROTHERS, ET AL., *Petitioners,*

v.

CALVERT DISTILLERS CORPORATION.

and

No. 443.

SCHWEGMANN BROTHERS, ET AL., *Petitioners,*

v.

SEAGRAM-DISTILLERS CORPORATION.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICI CURIAE

For American Booksellers Association, Inc., American Fair Trade Council, Caron Corporation, Chanel Incorporated, Charles of the Ritz, Inc., Colgate Palmolive Peet, Inc., Coty Incorporated, Evyan Incorporated, F. W. Fitch, Inc., Fountain Pen & Mechanical Pencil Manufacturers Association, Inc., Guerlain Incorporated, Helena Rubenstein, Inc., Houbigant, Inc., Jean Patou, Inc., John H. Woodbury, Inc., Lehn & Fink Products Corp., Lucien LeLong, Inc., National Association of Bedding Manufacturers, National Federation of Independent Business, Inc., Max Factor & Co., Northam Warren, Inc., Pond's Inc., Revlon Products Corporation, Richard Hudnut, Inc., The R. L. Watkins Co. Division, Wildroot Co., Inc., Yardley's of London, Inc.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 96 to 106) is reported at 184 F. 2d 11.

JURISDICTION.

The judgments of the Court of Appeals were entered on July 27, 1950 (R. 96, 102). A petition for rehearing was denied on September 15, 1950 (R. 115, 122). The petition for writs of certiorari was filed on December 8, 1950, and granted on February 26, 1951. The jurisdiction of the Court rests on 28 U.S.C. 1254.

QUESTION PRESENTED.

Whether the Miller-Tydings Amendment which exempts from Section 1 of the Sherman Anti-Trust Act minimum resale price "contracts or agreements," applies equally to all who by State law are bound to observe the terms of such agreements whether or not they are signers.

STATUTES INVOLVED.

The pertinent statutes are the Sherman Anti-Trust Act (Act of July 2, 1890, Ch. 647, Sec. 1, 26 Stat. 209, 15 U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) and the Louisiana Fair Trade Act (La. Act 13 of 1936; La. R. S. 51: 391-396).

INTEREST OF AMICI CURIAE.

In view of the large number of *amici curiae*, it is impracticable to describe in detail the individual interest of each. They consist of trade associations whose members utilize minimum resale price agreements extensively in their merchandising procedures and individual companies which similarly use such agreements. The associations and companies represent an important segment of the American economy, and an adverse decision in this case would vitally effect their merchandising practices.

STATEMENT.

Respondents, Calvert Distillers Corporation, a Maryland corporation, and Seagram-Distillers Corporation, a Delaware corporation, each brought suit against the petitioners who operate a supermarket in New Orleans, Louisiana, to enjoin them from selling Calvert and Seagram products for less than the minimum resale price specified in fair trade contracts entered into between the respondents and certain Louisiana retailers. The suits, which have been combined for purposes of appeal, were predicated on the Louisiana Fair Trade Act, Section 2 of which provides in substance that a person with notice of a minimum resale price contract is bound by its terms. Petitioners contend that this provision of the Fair Trade Act is inapplicable to transactions in interstate commerce because it conflicts with the terms of the Sherman Anti-Trust Act despite the exemptions provided in the Miller-Tydings Amendment. Both Courts below held that the Miller-Tydings Amendment exempted interstate transactions under Section 2 of the Louisiana Fair Trade Act from the prohibitions of the Sherman Act.

SUMMARY OF ARGUMENT.

The legislative history of the Miller-Tydings Amendment conclusively demonstrates that Congress gave specific consideration to the applicability of the Amendment to transactions involving non-signers and that Congress intended the Amendment to apply to such transactions. With a clarity rarely found in the history of controversial legislation, the reports of both houses of Congress, the hearings before the committee and the debates express the legislative design to include the non-signer provisions within the scope of the Miller-Tydings Amendment. Both the proponents and the opponents of the Amendment revealed their understanding that it encompassed the non-signer provisions; and, indeed, a principal cause of the vigorous

opposition to the amendment was its avowed applicability to transactions involving non-signers. So clear is the legislative history that the adoption of the interpretation proposed by the petitioners would constitute a disregard of the intention of Congress. The Amendment is to be construed to effectuate, not nullify, that intention irrespective of the wisdom of the legislative policy or its economic implications. Resort to legislative history is always appropriate for the purpose of determining the intention of Congress and the "plain meaning rule" must give way when its application would defeat the legislative purpose. The language here, even when literally construed, is entirely consistent with respondents' interpretation of the Amendment. Although the subject matter of the Amendment is the minimum resale price "contract" or "agreement," the language does not purport to limit its application to those who actually sign minimum resale price agreements, nor does it purport to be inapplicable to those who become bound by such agreements merely by notice thereof. Regardless of whether a contractual relationship technically exists in the case of a non-signer, the premise upon which the Congress acted in passing the legislation was that non-signers were bound to a minimum resale price contract of which they had notice to the same extent as the signers; and it is significant that every time Congress referred to the liability of non-signers that liability was cast in terms of an obligation under the contract.

ARGUMENT.

The Legislative History of the Miller-Tydings Amendment and Its Terms When Considered in Their Historical Context Compel the Conclusion That the Miller-Tydings Amendment Validates the Non-Signer Provisions of the State Fair Trade Acts in the Field of Interstate Commerce.

Fundamentally, the question is whether the Court will permit the judicial process to be utilized as a vehicle for the virtual repeal of the Miller-Tydings Amendment on the basis of an asserted adherence to the doctrine of literal statutory construction. For the petitioners correctly suggest here, as they explicitly urged on the court below in their plea for reversal, the fact that a decision in their favor "will cripple, if it will not kill the Miller-Tydings Act" as "the great and inescapable extra-legal effect overshadowing the narrow legal issues" involved in the case (Br. C. A. p. 6). The legislative history so conclusively demonstrates that Congress intended the Amendment to validate the non-signer provisions of the various state fair trade acts in their application to inter-state commerce that the adoption of a contrary conclusion would frustrate the obvious purpose of Congress. Regardless of the wisdom of the legislative policy, it is respectfully submitted that the Court should reject the invitation of the petitioners to cripple if not kill the Amendment by judicial interpretation.

Significantly the only other cases decided on this question unqualifiedly support respondents' position. *Calmia* v. *Goldsmith Bros., Inc.*, 299 N. Y. 636. *Pepsodent Co.* v. *Krauss Co.*, 56 F. Supp. 922.

1. An analysis of the entire legislative history of the Miller-Tydings Amendment reveals with a certainty rarely found in the history of such a controversial bill that:

(a) The principal issue in Congress was whether the Federal government or the individual States should

determine the policy with respect to resale price maintenance; and that, in enacting this legislation, it was the avowed intent of Congress to remove every obstacle created by the Federal anti-trust laws to the complete operation of State fair trade acts, so that there would be a single policy relating to resale price maintenance within the State;

(b) The Congress specifically considered the applicability of the Amendment to transactions involving parties who had not actually signed minimum resale price agreements; and

(c) The Congress understood and intended the Amendment to apply to so-called "non-signers" with notice.

Turning first to the history in the House (H. Rept. No. 382, 75th Cong. 1st Sess. p. 2),[1] the Committee to which H. R. 1611 was referred stated that the sole objective of the proposed legislation was "to permit the public policy of States having 'fair trade acts' to operate with respect to interstate contracts for the resale of goods within those States." That policy was described by the Committee in the following language (Ibid. 2):

> "State fair trade acts typically provide, first, that contracts may lawfully be made which provide for maintenance by contract of resale prices of branded or trade-marked competitive goods. *Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.*"[2]

[1] The Reports referred to in this Brief are the Conference Report on H.R. 7472 (75th Cong.) and the Reports on H.R. 1611 (75th Cong.) introduced by Mr. Miller and S. 100 (75th Cong.) introduced by Senator Tydings, the texts of which were practically identical. Neither of the latter two bills was enacted as such but the provisions of the Miller-Tydings Bills were added as Title VIII of H.R. 7472, entitled "A Bill to provide additional revenue for the District of Columbia and for other purposes."

[2] Italics supplied except where indicated.

The Committee's desire to facilitate this fair trade policy of the States was explicitly and forcefully expressed (Ibid. 3 and 4):

> "Your committee respectfully submit that sound public policy on the part of the Federal government lies in the direction of lending assistance to the States to effectuate their own policy with regard to their internal affairs. It is submitted that this is especially true where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of the power over interstate commerce by the States to the Federal government."

The purpose to substitute a State for a Federal policy in the field of resale price maintenance is manifested by the section of the Report entitled "Economic Aspects". There, after adverting to the arguments in support of the divergent views on the economic wisdom of resale price maintenance, the Report states (Ibid. 3):

> "However, in the opinion of the committee, those arguments are more properly addressed to the State legislatures considering the enactment of fair trade acts. It is the legislature's responsibility to fix the public policy of the State. This legislation merely seeks to help effectuate a public policy so fixed in a State. It has no application to any State which does not see fit to enact a fair trade act."

It is difficult to conceive of a clearer expression of the legislative understanding and intention that the Miller-Tydings Amendment was to be applicable to the so-called non-signers than that contained in this Report. Moreover, the following comments of Representatives Celler and Ramsay in their "Additional Views" indicate a similar understanding of the Amendment (Ibid. 24):

> "It must be kept in mind that the Supreme Court in upholding two *State laws of the type H. R. 1611 is intended to facilitate*, did not sustain price-fixing as an end. The Supreme Court merely upheld price-fixing

contracts, involving trade-marked articles in open competition; *as binding on all (on notice as to their existence)*, as a means to the end of protecting intangible rights in the trade-marks from destructive selling."

Thus, Representatives Celler and Ramsay in unambiguous terms indicated their understanding that the Miller-Tydings Amendment was intended to facilitate the free operation of the state laws which provided that minimum price resale contracts would be binding on all who had notice.

Not only do the majority and the concurring reports of the House Committee exhibit a clear understanding that the bill should apply to non-signers but, the hearings which took place before the preparation of the report reveal with equal clarity the same understanding on the part of both the proponents and the opponents of the bill. Thus, the representative of the National Association of Retail Druggists, a strong proponent of the bill, testified (Hearings on H. R. 1611, 75th Cong., 1st Sess., p. 3):

> Chairman Sumners. I would like to ask you a question, and that is whether or not concerns that sell trade-marked articles may not, under this bill, make special contracts with special concerns, in which they do not attempt to control their prices, retail prices? *Is there anything in this legislation, or any other legislation, that would require a concern* that is attempting to control prices at which its commodities can be sold by particular individuals *from also obligating all other individuals who buy that commodity to sell at the same price that they require these persons with whom they have contracts to sell?*
>
> Mr. Jones. Mr. Chairman, the Supreme Court, in last month, upheld the California and Illinois acts, which revolved around the question of whether or not a non-signer of these minimum-price contracts could be bound; *men who refused to sign the contracts or did not sign the contracts, but who had knowledge of such contracts, knowledge of such minimum contracts, and these State laws required that they observe and not destroy the value of a contract signed in the State, and Supreme Court . . .*

Chairman Sumners. *This legislation is simply seeking to effectuate the State laws, not establish Federal legislation independent in its operation?*

Mr. Jones. Yes. As I said, Mr. Chairman, I am not an attorney . . .

Chairman Sumners. I beg your pardon.

Mr. Jones. I think the next witness will cover that point clearly.

Mr. Miller. *It effectuates the State laws.*[3]

One of the most striking and revealing aspects of the legislative history is that the opponents of the Miller-Tydings Amendment testified against it for the very reason that *it did* apply to non-signers. The testimony of counsel for the National Retail Dry Goods Association is an example of this opposition (Ibid. 171-172):

Mr. Robison. As I understand it, it has been claimed that he makes a price with one fellow, one dealer, and notifies all of the other folks of that kind of contract, and they are bound by it.

Mr. Fox. They are bound. The manufacturer can say to a wholesaler in a State, "I am fixing the price to the retailer and consumer at so much on this thing", and any other wholesaler and retailer in the State must sell to retailer and wholesaler at exactly the same price.

* * *

Mr. Miller. And that question has not been passed on by the Courts?

Mr. Fox. Justice Sutherland's decision is one of the most careless decisions I have read. He says that there is no delegation of power. He says there is no delegation of power by the legislature. Can you think of any greater delegation of power than to give the right to a manufacturer to go into a State, get one wholesaler to agree on the price with him, get one retailer to agree on the price with him, and then everybody else in that State will have to observe that price?

[3] See also the statement of Congressman Wright Patman who discussed the non-signer provisions of the California, Illinois and Louisiana laws, and urged that the States should be permitted to enact such legislation if they so desired (Ibid. 20-21).

> If there is no delegation of power, I would like to know what it is. It is worse than the delegation of governmentally controlled commissions. Justice Sutherland said there was no delegation of power. He could not sustain that in argument in a million years. What they did in the Supreme Court was to say, "Well, if they want it, give it to them." It is the most vicious delegation of power that I know of. *It gives to two individuals the right to fix prices and conditions of resale for all others without the consent or advice of these others.*

Turning now to the consideration of the Amendment in the Senate, the record is equally persuasive as to the understanding and intention of that body. The Senate report specifically reveals a basic purpose to remove the barrier of the Federal anti-trust laws from the free operation of the State fair trade acts and eliminate conflicting economic philosophies with respect to resale price maintenance within a single state (No. 879, 75th Cong., 1st Sess., p. 6):

> The Congress is not called upon to pass upon the effectiveness of the remedy, but it should not put obstacles in the way of efforts of the individual States to make the remedy effective.
>
> • • •
>
> But most important, from the standpoint of the Congress, the proposed bill merely permits the individual States to function, without Federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the State laws.

The minority report which vigorously opposed the enactment of the Miller-Tydings Amendment laid particular emphasis on its applicability to non-signers. In that report, Senator King frequently adverted to the non-signer provisions of the fair trade acts. For example, it states (Ibid. Pt. 2, 6):

> And it should not be forgotten that these price contracts are not necessarily made with each wholesaler

> or retailer who resells the goods. The Supreme Court has always [sic] held valid, in the California and Illinois cases, the section in these State laws that allows the manufacturer or the wholesaler by having only one contract in a State to force his fixed price on other dealers within the State by merely giving such other dealers notices of the contract.

These references take on added significance in the light of the correspondence between the President and the Federal Trade Commission which is set out in full in the minority report. The recommendation of the Federal Trade Commission given in response to the President's request was extremely critical of the Miller-Tydings Amendment and emphasized as a basis for the rejection of the legislation, its applicability to non-signers (Ibid. 3):

> The Tydings-Miller bill would amend the antitrust laws so as to legalize contracts and agreements fixing minimum resale prices for goods sold in interstate commerce and resold within the jurisdiction of any State where such contracts or agreements as to intrastate commerce have been legalized. A number of States now have such statutes.
>
> • • •
>
> A peculiar feature of many of the State laws which would, under a recent decision of the Supreme Court, speaking through Mr. Justice Sutherland (57 S. Ct. 147), thus be made binding upon interstate commerce is that they require wholesalers and retailers to conform to the provisions of private resale price maintenance contracts to which they are not parties. Thus, a private contract, the provisions of which are determined without public hearing and apart from any public supervision as to reasonableness, is made binding upon all dealers and the consuming public.

This recommendation is probably the most clarifying single item of historical data, and can in no way be minimized for it serves to reflect not only the general understanding of the legislators, but also the contemporaneous

interpretation of an administrative agency which was directly and vitally concerned with the application and scope of the legislation.

It is highly significant that in all the legislative history of the Amendment, the reports of the Committees, the hearings, and, as will appear, the debates on the floor of Congress, it was never once suggested that the Amendment did not apply to non-signers; it was never once suggested that the scope of the Amendment was limited to the effectuation of only a minute segment of State fair trade policy. The opponents of the Amendment, who based their attack upon the premise that the legislation was applicable to non-signers, were never once answered with the charge that their premise was erroneous. The answer consistently given by the proponents of the legislation was that its purpose was simply to effectuate the policy of the States; and it was thus that Senator Tydings expressed the position of the sponsors of the legislation when he stated: (81 Cong. Rec. 9700)

> What we have attempted to do is what 42 States have already written on their statute books. It is simply to back up those acts, that is all.

While the debates contain abundant evidence that the purpose of Congress was to give free play to State fair trade acts and that the legislation was intended to apply to non-signers,[4] the most striking declaration of this purpose

[4] The legislative history of the Miller-Tydings Amendment is replete with additional evidence that the purpose of the legislation was to remove every barrier to the free operation of the State fair trade acts. See, for example, the additional statements of Mr. McLaughlin on the floor of the House (81 Cong. Rec. 10425) to the effect that the Amendment "enables fair trade legislation passed by individual State legislatures to become effective and to be fully operative within the respective States." See statement of Representative Dirksen (81 Cong. Rec. 8138) to the effect that the legislation was "an enabling Act which placed the stamp of approval upon price maintenance transactions under State acts, notwithstanding the Sherman Act of 1890." See also statement of Senator Austin (81 Cong. Rec. 7497), and statement of Senator King (81 Cong. Rec. 7491).

on the floor of Congress is contained in the statement of Mr. McLaughlin urging the adoption of the Conference Report (81 Cong. Rec. 10425). After pointing out that the State fair trade acts "practically uniformly provide that any retailer . . . is bound by that contract although he may not be a party to it . . ." he specifically answered the objections which had been levied against the Amendment. The first objection, Mr. McLaughlin stated, was that it would, if enacted, "impose a penalty upon a seller of merchandise for selling such merchandise below the minimum price agreed upon in a contract to which he is not a party." Significantly, Mr. McLaughlin did not deny the premise but rather acknowledged the correctness of the interpretation and answered the objections as follows (Ibid. 10427):

> The first objection, namely, that H.R. 1611, if enacted, will permit resale contracts to be binding upon parties other than the parties to the contract itself, is fully answered by the statement that the respective State laws make provision that the contract shall be binding upon all those who sell the trade-marked article which is the subject of the resale contract whenever the person selling the article below the contract resale price does so willfully and knowingly. This argument is well answered by the controlling opinion of the Supreme Court of the United States in the case of Old Dearborn against Seagram, supra, upholding the validity and constitutionality of the Illinois State Fair Trade Practice Act. . . .
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> • • •
>
> Further complete answer to this objection is that the respective States in the exercise of their wisdom and judgment imposed the penalties provided in the respective State acts. The bill before us today, if enacted, merely makes effective the law which has been enacted by the respective State legislatures to govern transactions within their own borders.

The legislative history of the amendment is so unambiguous and conclusive that the adoption of the interpretation proposed by the petitioners would constitute a disregard

of the legislative will.[5] Rarely is the legislative history of a statute so demonstrative. While the legislative history contains innumerable references indicating that Congress understood the Miller-Tydings Amendment to validate non-signer provisions, there has not been discovered a single specific reference to a desire on the part of Congress to exclude such provisions from the scope of the Amendment. While the history is permeated with references to the legislative design to support and effectuate the policy of State fair trade acts, no specific reference can be found to an intention to validate only an ineffectual portion of that local policy.

The conclusive nature of the legislative history has been recognized in one of the few articles dealing with the question in any detailed manner. (16 N.Y.U.L.Q. 114) In concluding "that there is no real basis for . . . limiting the

[5] The conclusive nature of the legislative history is indicated by the weakness of the statements relied upon by the petitioners. They have been unable to adduce any significant comment, which when subjected to careful scrutiny and considered in context fails to support the interpretation demonstrated here. A large portion of the petitioners' argument on legislative history is devoted to a discussion of the *Dr. Miles* case (220 U. S. 373) from which they proceed to the unproven assertion that the only reason for the passage of the Miller-Tydings Amendment was to nullify the ruling in that case. The petitioners' repeated references to the legislative history of earlier bills of somewhat similar context, which Congress failed to enact, is of little assistance in determining the purpose of Congress in passing this legislation. Nor is it true that House Report No. 382 makes only passing reference to the non-signer provisions of the fair trade act. The petitioners also rely upon general and inconclusive statements which are isolated from the context. For example, the petitioners' reliance upon a single general comment of Mr. McLaughlin is hardly justified in view of the very clear exposition which Mr. McLaughlin gave of his understanding of the Bill and of the purpose of Congress in passing it. Finally, the deletion of the words "or other conditions" and the inclusion of prohibitions against horizontal price-fixing hardly seem to warrant the emphasis placed upon them by petitioners since they can in no conceivable way bear upon the applicability of the Miller-Tydings Amendment to non-signers.

sphere of the applicability of . . . the Federal Act," the author made the following observation:

> The legislative history of the Miller-Tydings Bill fully supports the conclusion that Congress intended to give the states a free hand to enforce their programs and had no intention of retaining the sole jurisdiction over non-contracting dealers who are engaged in interstate commerce. The Federal Bill, sometimes referred to as an enabling act, was passed with full knowledge of the nature and extent of the duty to observe prices imposed by the State Acts and with the very purpose of imposing an analogous duty upon those engaged in interstate commerce. In the hearings before the House Committee and in the debates upon the bill in the committee, objection was made to imposing a duty upon non-contracting dealers but the objections were overruled by the committee after full discussion.

It is unnecessary to argue at length the propriety of reference to historical materials, since this Court, in recognition of the dominance of legislative intention as a factor in statutory construction and the futility of isolating words from historical context, has consistently denied the existence of a rule of law which would preclude resort to legislative history, "however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Associations*, 310 U. S. 534, 544. See also *Harrison* v. *Northern Trust Co.*, 317 U. S. 476; *Mitchell* v. *Cohen*, 333 U. S. 411; *Gregory* v. *Helvering*, 293 U. S. 465; *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609; *Armstrong* v. *Nu-Enamel Corp.*, 305 U. S. 315; *Vermilya Brown Co.* v. *Connell*, 335 U. S. 377. Thus, even were it true that the language of the Amendment were superficially inconsistent with the position here taken—and the invalidity of this assumption will be demonstrated later—it would not only be appropriate but would indeed be essential to consider, in addition to the words of the statute, "the context, the purposes of the law, and the circumstances under which the

words were employed" *Vermilya Brown Co.* v. *Connell, supra,* 386. While rules of construction of equal authority will often point in opposite directions, it is certainly safe to assert that the principle of literalness can never be utilized to produce a judicial result which is in obvious and open conflict with the legislative intention. See *Ozawa* v. *United States,* 260 U. S. 178; *Williams* v. *United States,* 289 U. S. 553; *Popovici* v. *Agler,* 280 U. S. 379; *Helvering* v. *Morgan,* 293 U. S. 121; *Fleischmann C. Co.* v. *United States to the use of Forsberg,* 270 U. S. 349; *Shapiro* v. *U. S.,* 335 U. S. 1.

Inquiry into legislative purpose may admittedly in some instances involve the danger "that the Court's conclusion as to legislative purpose will be unconsciously influenced by the judge's own views . . ." *United States* v. *American Trucking Association, supra,* p. 544. However, such danger is not even potentially present when the purpose of the legislative body is so conclusively established as it is here. Indeed, the only danger that might conceivably exist in a case of this nature would be the use of judicial process to subvert a legislative policy of doubtful wisdom by adherence to the dogma of literal interpretation.

2. The Court has continuously applied the principle that a statute should be interpreted in a manner which will preserve rather than nullify its usefulness. Yet, despite their protestations to the contrary, it is apparent that the petitioners request an emasculating construction of the Amendment on the basis of an asserted lack of legislative wisdom. The petitioners have suggested to this Court that the Amendment is "inflationary" (Br. p. 12), that it was "fostered" on the public under the name "fair trade" (Ibid. 30), that it has been used as a "blackjack" (Ibid. 32), and that it has been consistently subject to attack as antagonistic to the welfare of the public by the Department of Justice, the Federal Trade Commission and the Temporary National Economic Committee (Ibid. 30-31). In the petitioners' view, the solution to these problems would be to in-

terpret rather than legislate the life out of the statute; and there is no question that they were entirely correct in their assertion to the Court of Appeals that a decision adopting their construction of the statute would cripple, if not kill, the Amendment[6] (Br. C. A. p. 6). As was observed in 16 N.Y.U.L.Q., *supra*, p. 114:

> . . . if . . . the provision of the state Fair Trade Acts binding non-contracting dealers is restricted to intrastate business, the combined State and Federal legislation will, in the bulk of transactions, afford but scanty protection to the owner of the good will.
>
> * * *
>
> Furthermore, some courts have indicated that a dealer who is bound to maintain prices will be released from his duty where the owner of the good will fails or is unable to take action against competing dealers in the same product who are cutting prices. In this manner, the freedom of non-contracting dealers in a given product to cut prices as they please in interstate commerce, will ultimately release competing intrastate dealers in the same product (even contracting dealers) from their obligation to maintain resale prices. In the light of these considerations, it is apparent that little, if anything, would remain of the whole protective structure of the resale price maintenance legislation.

As we have shown, according to the House Report, the purpose of the legislation was to "effectuate a public policy so fixed in a State" and, according to the Senate Report, the legislation was enacted on the theory that Congress "should not put obstacles in the way of efforts of the indi-

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[6] See 51 Harv. L. Rev. 344, which states the problem as follows: "It has been suggested that the Miller-Tydings Act further limits the seller, and gives him legal recourse only against a contractually bound price-cutter, since it refers only to the legalization of the price maintenance contracts themselves, and unlike most state legislation fails expressly to mention price-cutting by those not parties to the contract. Since price maintenance is extremely difficult unless noncontractors with knowledge of the price restrictions are bound, this strict construction of the Act would greatly impair its usefulness."

vidual states to make the remedy effective." According to Senator Tydings, the purpose was "to back up those (the State) Acts." According to Mr. McLaughlin, the purpose was to enable the fair trade legislation of the individual states "to become effective and to be fully operative." According to Representative Dirksen, the purpose was to put "the stamp of approval upon price maintenance transactions under State Acts." According to Senator Austin, the purpose was to "preserve . . . their (the States) right to manage their own affairs . . ."

If the Amendment is now interpreted in the frustrating manner petitioners suggest, then the judicial function will not have been applied in accordance with the principle laid down by the Court that "every reasonable presumption attaches to the proscription to require the courts to make it [the legislation] effective in accord with the evident purpose" *United States* v. *Evans*, 333 U. S. 483, 486. Perhaps one of the best expositions of the process of statutory construction in a context such as this, is set forth in *Markham* v. *Cabell*, 326 U. S. 404, where the Court refused to read Section 9(e) of the Trading with the Enemy Act literally "without regard to its history." After pointing out that "the policy as well as the letter of the law is a guide to decision," the Court made the following observation (p. 409):

> "The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

Whether the Miller-Tydings Amendment is or is not inflationary; whether or not it was "foistered" on the public or "smuggled" into the law; whether or not it has been the subject of uniform criticism by the Department of Justice and other agencies of the Federal Government; the Amendment must be interpreted "in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen"; and "the 'plain meaning' rule [must] give way where its application would produce a

futile result . . ." *Shapiro* v. *United States*, 335 U. S. 1, 31. See also *Armstrong Paint & Varnish Works* v. *Nu-Enamel, supra; Markham* v. *Cabell, supra; Haggar Co.* v. *Helvering*, 308 U. S. 389.

3. The language of the Miller-Tydings Amendment, even when literally construed, is consistent with the position of the respondents. While the Amendment removes from the scope of the Sherman Act "contracts or agreements describing minimum prices . . .", it does not purport to limit the scope of the Amendment to transactions involving those who actually sign minimum resale price agreements, nor does it purport to be inapplicable to those retailers who become bound by such agreements by virtue of the purchase of a commodity with notice of the fair trade restriction. The entire argument of the petitioners ignores the historical fact that, at the time the Amendment was enacted, non-signing retailers were considered to be bound by, and in substance parties to, minimum resale price contracts when they purchased branded commodities with notice of such a contract. The very theory upon which the non-signer provisions of State fair trade acts have been upheld is that a non-signing retailer, by contracting to purchase a commodity with knowledge of an existing minimum resale price agreement, assents to the price restriction which then becomes a part and indeed a condition of the non-signer's contract of purchase. Thus, in the case of *Old Dearborn Distilling Co.* v. *Seagram-Distillers Corporation*, 299 U. S. 183, the Court in sustaining the constitutionality of the Illinois Fair Trade Act, after pointing out that it was not concerned with one who had "made his purchase in ignorance of the *contractual restrictions* upon the selling price" made the following observation (p. 193):

> Appellants here acquired the commodity in question with full knowledge of the then existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and

> their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, *assent to the protective restriction* with consequent liability under section 2 of the law by which such acquisition was conditioned.

See also, *Eli Lilly & Company* v. *Saunders*, 216 N. C. 163, 4 S. E. 2d 528, 125 ALR 1308, where the Supreme Court of North Carolina in sustaining the non-signer provisions of the North Carolina Fair Trade Practices Act, made the following statement:

> If the law itself is valid, and we hold it to be so, it is a public statute which the defendant was bound to have in contemplation when he made the purchase.

Entirely apart from the question whether as a matter of law a contractual obligation can be said to exist in the case of a non-signer, it is certainly clear that such was the premise on which the Congress acted in passing the Amendment which excluded certain "contracts or agreements" from the prohibitions of the Sherman Act. For example, the House Report contains the following statement in its description of a typical State fair trade act (H. Rep. 382, p. 2):

> Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.

The statement of Representatives Celler and Ramsay which has been set out earlier, proceeds on the theory that the price-fixing contracts themselves are "binding on all (on notice as to their existence)." The Federal Trade Commission recommendation was based on the premise that non-signing retailers were compelled to conform to the provisions of minimum resale price contracts and were bound by such contracts in the same manner as those who signed them. In fact, an analysis of the legislative history referred to earlier in this brief will reveal a Congressional

understanding that non-signers with notice were as much bound by minimum resale price agreements as those who actually signed such agreements.

It is significant that, in almost every instance in which the liability of non-signers with notice was referred to in the legislative history of the Miller-Tydings Amendment, it was cast in terms of an obligation under the contract. Any argument, therefore, to the effect that the exemption of "contracts or agreements" is inapplicable to non-signers, misconceives an essential premise of the legislation, namely, that non-signers who purchased branded commodities with notice of an existing minimum resale price contract assented and agreed to the price restriction as a part of the transaction of purchase, and were, therefore, thus bound to a minimum resale price contract in the same manner as if they had signed such a contract.

Actually, the authorities upon which the petitioners rely support the position that a contractual relationship was considered by Congress to have existed in the case of non-signers. Thus, Shulman, writing on *The Fair Trade Acts*, 49 Yale L. Jour. 607, 618, makes the following statement with reference to the liability of non-signers:

> The old resale price maintenance rested entirely on contract and the producer's power to refuse to sell to those who would not comply. *The Fair Trade Acts pretend to be also based on contract.* So the Supreme Court and Mr. Rogers point out that the Acts merely permit the parties to a sale to make a voluntary agreement as to resale prices if they so desire. But isn't that completely fanciful? A single contract between the manufacturer and a single retailer, if brought to the attention of the entire trade, is sufficient to bind the entire trade.

While it is true that Shulman states that the contract theory is "fanciful" and contends that in reality it is notice of the fixed price which is the basis of the fair trade acts, the significant fact is that the non-signer provisions of the fair trade acts purport to be based on contract and Congress so

understood when it enacted the Miller-Tydings Amendment.

As a matter of fact, there is nothing fanciful about the theory which formed the basis of the *Old Dearborn* decision. That laws which are in effect at the time and place of making a contract, such as a contract of purchase, are as much a part of a contract as if they were expressly incorporated therein is a basic principle. It may be found in innumerable State decisions and has been relied upon by this Court and the Courts of Appeals. In *Wood* v. *Lovett*, 313 U. S. 362, 370, the Court held that laws which existed at the time and place when the contract was made "enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." In that case, the Court held that the terms of a statute which accorded rights and immunities to a vendee became part of the obligation of a quit claim deed despite the fact that the statute was later repealed. The Court further held that the repealing statute could not be construed as removing the terms incorporated into the deed by the prior statute without an unlawful impairment of contract. See also *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649; *Home Building & L. Assn.* v. *Blaisdell*, 290 U. S. 398.

The relatively recent decision of the Court of Appeals for the Second Circuit, in *Bataglia, et al* v. *General Motors Corp.*, 169 F. 2d 254, was largely predicated on the theory that employment contracts were modified so as to include "judicially established law" despite the fact that the contracts were entered into prior to the judicial declarations; and the observation of the Court in this respect is significant (p. 258):

> At the same time, if it can be said that the contracts of employment were modified upon the enactment of the Fair Labor Standards Act, perhaps it also can be said that when those decisions were made, the contracts of employment were again modified so as to take the judicially established law into consideration. *Were this the case, even if the rights of the employees were*

purely statutory up to the time of those decisions, thereafter they were based upon contract."

See also *Roland Electrical Co.* v. *Black*, (C. A. 4) 163 F. 2d, 417, 426.

It is submitted therefore that the substantive law of the State of Louisiana becomes a part of the contract of purchase entered into by each non-signing retailer. Admittedly, such a contract incorporating the minimum resale price restrictions would, as applied to interstate commerce, violate the Sherman Act were it not for the Miller-Tydings Amendment; but this would also be the case with respect to a contract which by its own terms incorporated minimum resale price restrictions. In either instance the Miller-Tydings Amendment removes "the contract or agreement" from the scope of the anti-trust laws.

At any rate, it is entirely irrelevant whether an action against a non-signer sounds technically in tort or in contract or whether it is based upon the doctrine of equitable servitude. While the subject matter of the Amendment is the contract or agreement, even a cursory analysis of the legislative history demonstrates that the Congress considered non-signers to be as firmly bound to a minimum resale price contract of which they had notice as the signer; and the words "contract or agreement" were utilized in that context. In enacting the Amendment, Congress acted on the premise that such agreements were equally operative against signers and non-signers, and having thus validated the contracts, permitted their operative effect to be determined under State law.

CONCLUSION.

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

HERBERT A. BERGSON.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 442

SCHWEGMANN BROTHERS, ET AL., Petitioners,

v.

CALVERT DISTILLERS CORPORATION, Respondent

and

NO. 443

SCHWEGMANN BROTHERS, ET AL., Petitioners,

v.

SEAGRAM-DISTILLERS CORPORATION, Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

The Commonwealth of Pennsylvania has filed in the case of Sunbeam Corporation, a Corporation, Petitioner, versus S. A. Wentling, Respondent, October Term, 1950, No. 538, a brief as *amicus curiae* in support of the petition for a Certiorari.

It is respectfully suggested that decision herein be reserved until

(a) The petition for Certiorari in the Sunbeam case be considered, and if granted

(b) Argument before the Court is had in that case, which may properly be regarded as a companion case and considered at the same time.

STATEMENT OF THE CASE

The Pennsylvania Fair Trade Act of June 7, 1935, P. L. page 266, as amended by the Act of June 12, 1941, P. L. 128, 73 Purdon's Pennsylvania Statutes, Sections 7 and 8 (quoted in Appendix D, page 21a of petitioner's brief in the Sunbeam case) is substantially the same as the Fair Trade Act of Louisiana which is involved in the cases now at bar.

Pennsylvania has a direct and substantial interest in the questions involved in these cases.

Pennsylvania is an industrial state. Its vast production of raw materials and supply of skilled labor provide facilities for the manufacture of innumerable trade marks and valuable articles which are sold and shipped into all of the states of the union: If the construction of the Miller-Tydings amendment is limited so as not to permit the Pennsylvania Fair Trade Act to be effective on sales beyond the boundaries of the Commonwealth of Pennsylvania, its industries would not develop the quantity of production and lower cost or provide the funds for research and improving the quality of an article which are made possible by a larger volume of sales.

By far the greater portion of the trade-marked and branded articles produced in Pennsylvania are sold to purchasers in other states, which have Fair Trade laws. Ability of the Pennsylvania manufacturer to stabilize the price of his article is necessary to protect the quality and efficiency of his products and does not confer upon him a monopoly. His product is still obliged to meet the keenest competition of other manufacturers of similar articles.

ARGUMENT

In connection with the application for certiorari in the instant case, the Commonwealth of Pennsylvania requests this court to consider the brief filed by it as *amicus curiae* in *Sunbeam Corporation, Petitioner v. Wentling,* No. 538. In the latter brief the Commonwealth also adopted the brief filed by the petitioner.

In addition the Commonwealth desires to add the following:

The Louisiana Fair Trade Act Is an Act "Of That Description" Contemplated by the Miller-Tydings Act Permitting Minimum Resale Price Agreements as to Trade-Marked Goods Sold in Open Competition; and Appellees' Minimum Resale Price Contracts Were Executed Pursuant Thereto and Are Valid.

The controlling words of the Miller-Tydings amendment permit

"agreements prescribing minimum prices for resale of a commodity"

(a) bearing a trade-mark, brand or name

(b) "in free and open competition"

(c) when "*agreements of that description* are lawful as applied to intrastate transactions under any statute, law or public policy * * *"

(d) and the making of such "agreements shall not be an unfair method of competition * * *" (Italics supplied)

The proviso prohibits horizontal minimum price agreements, hence the permitted minimum price agreements must be vertical.

The key words are "agreements prescribing minimum prices for the resale of a commodity."

Agreements "of that description" are permitted provided they are vertical not horizontal.

Congress had before it the then existing forty-two state fair trade acts which provided that third parties with notice of fair trade contracts are bound by the terms thereof. Report No. 382 of the Committee on the Judiciary to the House of Representatives contains the following:

> "State fair trade acts typically provide, first, that contracts may lawfully be made which provide for maintenance by contract of resale prices of branded or trade-marked competitive goods. Second, that *third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.*" (Emphasis supplied)

And this Court had said in *Old Dearborn Co. v. Seagram Corp.*, 299 U.S. 183, 193 (1936):

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with

it, *upon every principle of fair dealing,* assent to the protective restriction, with consequent liability under Sec. 2 of the law by which such acquisition was conditioned." (Emphasis supplied).

The great objectives of the Sherman Act must be sustained to the full, but the question here is whether the Federal policy as enunciated in the Sherman Act as amended by the Miller-Tydings amendment requires the striking down of the policy of forty-five state fair trade acts, which in order to make such policy effective have enacted the provisions binding non-signers with knowledge, and also requires the striking down of innumerable fair trade agreements made pursuant to such fair trade acts, which agreements require signers not to sell except to those who agree to be bound.

There can be no doubt that the Louisiana Act complies with the requirements of the Miller-Tydings amendment. The dissent below does not question this but is merely to the effect that the Miller-Tydings Act does not authorize provisions as to non-signers with knowledge.

But the policy as to the agreements themselves being validated necessarily carries with it all means of enforcement, especially such a mere adjuvant as to binding those having knowledge.

And the Provisions of the Fair Trade Acts as to Non-Signers Are Declaratory of Existing Law. Equity Would Have Granted Relief Against Non-Signers Having Knowledge.

In the *Dr. Miles Medical* case, 220 U. S. 373, 55 L. Ed., 502, 31 S.C. 376 (1911), the defendant was a non-signer with knowledge. This Court said:

> "The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate remedy at law, equitable relief will be granted. Angle v. Chicago, St. P. M. & O. R. Co., 151 U.S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Bitterman v. Louisville & N.R. Co., 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 A. & E. Ann. Cas. 693."

(No wonder Congress did not think it necessary to refer to the provisions of the fair trade laws as to non-signers with knowledge.) The Court then proceeded to the decision that the contracts themselves were in restraint of trade (Lurton, J., taking no part). Justice Holmes dissented, saying:

> "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

It is apparent that the real question raised by the dissent below is whether fair trade contracts expressly authorized by forty-five fair trade statutes, the non-signer provisions of which were known to Congress and had been passed upon by this Court, which State Statutes were permitted by the Miller-Tydings amendment, are as to non-signers, contracts in restraint of trade in violation of the Sherman Act because the Miller-Tydings Act did not expressly refer to provisions as to non-signers.

There can be but one answer, that given by District Judge Frederick V. Follmer in *Sunbeam Corporation v. Wentling,* 91 F. Sup. 81 (1950).

> "Congress has spoken and the Legislature * * * has spoken and there is no doubt in my mind what was the legislative intent in the above instances."

The language and meaning of the Miller-Tydings Amendment are, without a scintilla of ambiguity or doubt, to

> "permit the public policy of States having 'fair trade acts' to operate with regard to interstate contracts for the resale of goods within those States."
>
> HR Report No. 388 of Committee on the Judiciary.

And this Court has referred in passing to the Miller-Tydings Amendment as the federal 'Fair Trade' Act:

> "Both the federal and state 'Fair Trade' Acts expressly provide that they shall not apply to price

maintenance contracts among producers, wholesalers and competitiors."

U. S. v. Frankfort Distillers, 324 U.S. 293, (1944).

Congress acquiesced in the belief that the owner of a trade-mark is entitled to protection in his good will against unfair competition from price-cutters selling not merely an article of merchandise *but a trade-marked article.* Congress approved the market-wise philosophy of the late Mr. Justice Brandeis who so cogently set forth the wrong to the trade-mark owner and to the public in price-cutting of trade-marked goods. He is thus quoted in "The Brandeis Guide to the Modern World", by Alfred Lief:

> "If a dealer is selling unknown goods or goods under his own name, he alone should set the price; but when a dealer has to use somebody else's name or brand in order to sell the goods, then the owner of that name or brand has an interest which should be respected. The transaction is essentially one between the two principals—the maker and the user. All others are middlemen or agents; for the product is not really sold until it has been bought by the consumer.
>
> "Why should one middleman have the power to depreciate in the public mind the value of the maker's brand and render it unprofitable not only for the maker but for other middlemen? Why should one middleman be allowed to indulge in a practice of price-cutting, which tends to drive the maker's goods out of the market and in the end interferes with people getting the goods at all?

In his dissenting opinion in *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, at page 253, Mr. Justice Reed said:

> "The public policy of the United States fosters the free-enterprise system of unfettered competition among producers and distributors of goods as the accepted method to put those goods into the hands of all consumers at the least expense. There are, however, statutory exceptions to such unlimited competition.[4]"

In *Appalachian Coals, Inc., v. U. S.*, 288 U. S., 344 (1933) competing producers of bituminous coal in the Appalachian area formed a corporation to act as an exclusive selling agent, with authority to set prices. The declared purpose was to eliminate destructive competition. It appeared that the great bulk of their output was marketed in another highly competitive region.

This court held that the Sherman Act was not violated, and, in its opinion, Chief Justice Hughes said:

> "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable to constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes

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"4. E. g., Interstate Commerce Act, § 5, 49 U. S. C. §5; Communications Act of 1934, § 221, 47 U. S. C. § 221; Miller-Tydings Act, 15 U. S. C. § 1. And see Mason, The Current Status of the Monopoly Problem in the United States, 62 Harv. L. Rev. 1265."

are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to egtablish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. * * * (359-360)

"In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The *mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it.* * * *" (Emphasis ours) (360)

The Miller - Tydings Amendment, in making workable our federal system of government, is akin to the wise cooperation in the Webb-Kenyon Act (27 U.S.C.A. 122), and in Public Act 15 (15 U.S.C.A. 1011).

Under well-settled canons of construction Congress will be presumed not to have intended an absurd and illusory result.

The *Dr. Miles Medical* case had been based upon the restraint having been unreasonable at common law, hence within the policy of the Sherman Act. Congress now removes that stigma by expressly permitting such contracts when permitted by State law. There is no longer any such "common law" in force in those 45

states. The restraints of the contracts are "reasonable" in those states.

The provision as to non-signers (not referred to in either the Sherman or the Miller-Tydings Act) is merely an addendum to make the fair trade policy effective, to put into the statute the well-known equitable principle against wilfully bringing about a breach of contract by another.

Conceivably, and indeed probably, the remaining three states may adopt fair trade acts, thus making practical uniformity absolute unanimity. There would then be no common law prop anywhere in our vast domain for the *Dr. Miles Medical* decision.

Congress foresaw the other states following on after the 42 pre-Miller-Tydings Fair Trade Act states and must have intended the consequences of its own Act — a uniform fair trade state policy quite in consonance with the policy of the Robinson-Patman anti-discrimination act as tending to uniformity in treatment of customers at the consumer level.

The Sherman Act must be viewed in the light of the statutes, acts and decisions in the history of the last 40 years. And as to trade-marked goods fair-traded under fair trade acts, *Dr. Miles Medical* has been wholly superseded. That decision would not have been made with the Miller-Tydings Amendment and the State Fair Trade Acts on the books. And now there is freedom of contract to determine resale prices of one's own trade-marked and fair-traded goods and free trade across as well as within state lines.

The language of the Miller-Tydings Amendment is broad and sweeping except that horizontal agreements are not permitted. Hence, by the *maxim expressio unius exclusio alterius,* all vertical agreements are valid including subsidiary agreements to make effective the purpose of the Amendment to sustain the state public policy.

We are dealing with the federal public policy as established by Congress in the Miller-Tydings Amendment. *That* policy *is now the state fair trade policy.* That policy as embodied in state fair trade Acts is the supreme law of the land: Acts "of that description" are valid as to all vertical agreements and all provisions reasonably appropriate to the effectiveness of such agreements.

To sum up: The Louisiana Fair Trade Act fulfills the specifications of the Miller-Tydings Amendment as to resale prices of goods fair-traded under said Fair Trade Act. By the Miller-Tydings Amendment the previous federal public policy has been superseded by the state public policy. As to vertical agreements the federal public policy *pro tanto* now *is* the state public policy.

Congress knew that the state fair trade acts had provisions binding parties with notice.

This Court had upheld such a provision "upon every principle of fair dealing."

The policy as to the fair trade agreements necessarily includes all provisions reasonably appropriate to the effectiveness of resale price covenants including pro-

visions for requiring assent by the buyer and binding the buyer with knowledge.

Such provisions are merely declaratory of existing law.

The report of the Committee on the Judiciary showed the intent of "permit the public policy of States having 'fair trade acts' to operate * * *"

Congress has ordained that the owner of a trademark may be protected in his good will as against competition which is unfair according to the marketwise philosophy of Mr. Justice Brandeis and the dissent of Mr. Justice Holmes.

Congress will be presumed not to have intended an absurd and illusory result.

On the contrary, Congress may well have foreseen a uniform fair trade state policy in consonance with the policy of the Robinson-Patman Anti-discrimination Act.

The decision in the *Dr. Miles Medical* case that the resale agreements were in "restraint of trade" would not have been made with the Miller-Tydings Amendment and the state fair trade acts on the books. But that case itself recognizes that an "actionable wrong is committed" by one who induces a breach of contract; and equitable relief would have been granted but for the decision as to the infirmity of the contract itself.

Conclusion.

The Commonwealth of Pennsylvania repeats its suggestion that decision herein be deferred until after the ruling upon the petition in the Sunbeam case, and that if such petition be granted, until after argument in said Sunbeam case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF ON BEHALF OF LOUISIANA STATE PHARMACEUTICAL ASSOCIATION, AMICUS CURIAE

C. ELLIS HENICAN,
PHILIP E. JAMES,
MURRAY F. CLEVELAND,
Attorneys for Louisiana State Pharmaceutical Association, *Amicus Curiae*.

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF ON BEHALF OF LOUISIANA STATE PHARMACEUTICAL ASSOCIATION, AMICUS CURIAE

This brief is filed on behalf of the Louisiana State Pharmaceutical Association, a Louisiana corporation organized in 1884. The active membership is composed

of pharmacists and qualified assistant pharmacists practicing in Louisiana.

As stated in the briefs on behalf of petitioner and respondents, these cases are before this Court on writs to the United States Court of Appeals for the Fifth Circuit granted February 26, 1951. The opinion of the Court of Appeals for the Fifth Circuit, affirming the judgment of the United States District Court for the Eastern District of Louisiana, is reported in 184 F(2d) 11 (1950).

The jurisdiction of this Court is founded on the provisions of 28 U. S. C. 1254 (1).

STATEMENT OF THE CASE

These two suits for injunctions were brought under Louisiana Act 13 of 1936, now La. R. S. 51: 391-396, the Louisiana Fair Trade Act.[1] The purpose of the suits was to obtain relief from price cutting by Schwegmann Brothers. Calvert and Seagram (Maryland and Delaware corporations, respectively) are distributors of alcoholic beverages, and Schwegmann Brothers is a Louisiana partnership operating a super-market in New Orleans.

Calvert and Seagram established fair trade prices on certain whiskies and Schwegmann sold the liquors

[1] Appendix A.

in question at cut-rate prices below the established minimum, with full knowledge that fair trade prices had been established through contracts with other Louisiana retailers. This is conceded by Schwegmann Brothers, who contend that they are not governed by the Louisiana Fair Trade Act because they did not sign contracts with Seagram and Calvert agreeing to the Fair Trade prices.

As conceded by Schwegmann Brothers in their brief (p. 3), the Louisiana Fair Trade Act is typical of fair trade statutes in forty-five states. It contains two basic provisions: Section 1, providing that fair trade contracts meeting certain specified conditions shall not be invalid by reason of establishing minimum resale prices; and Section 2, providing that knowingly selling at less than the fair trade price established pursuant to Section 1 is unfair competition actionable by anyone damaged thereby.

In the Fifth Circuit Court of Appeals Schwegmann Brothers limited their position to two contentions: (1) that the contracts between Calvert and Seagram and various Louisiana retailers were invalid because of lack of mutuality, and (2) that the Miller-Tydings Amendment [1] to the Sherman Act [2] legalizes only *contractual* fair trade and does not authorize fair trade as to a non-contracting retailer. As the first point is not covered by the Schwegmann Brothers brief in this Court, it has evidently been abandoned.

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[1] Act Aug. 17, 1937, C. 690 Title VIII 50 Stat. 693, 15 U. S. C. Sec. 1.
[2] Act July 2, 1890, C. 647, 26 Stat. 209, 15 U. S. C. Secs. 1-7.

Hence, their position now rests exclusively on the second point.

The basic position of Schwegmann Brothers, therefore, is that *some violation of the Sherman Act* deprives Seagram and Calvert of their right to protect their products against cut-rate sales by a non-contracting retailer.

QUESTION PRESENTED

According to the brief filed on behalf of Schwegmann Brothers (p. 2), the question presented is as follows:

> "The Miller-Tydings Amendment excepts from the Sherman Act resale price maintenance by 'contracts or agreements'. Does this exception extend to resale price maintenance imposed on unwilling, non-contracting parties under the non-signer clause of the Louisiana Fair Trade Act?"

While this is undoubtedly the question presented by the Schwegmann Brothers brief, it is *not* the basic question presented by these cases.

Calvert and Seagram entered into fair trade contracts with Louisiana retailers other than Schwegmann Brothers. These contracts met all requirements of the Louisiana Fair Trade Act; and under the provisions of the Miller-Tydings Amendment these

contracts were *expressly authorized* and did not violate the Sherman Act.

The real question then, is whether a violation of the Sherman Act occurred by virtue of the fact that the Louisiana Legislature provided in Section 2 of the Louisiana Fair Trade Act that noncontracting retailers are guilty of unfair competition when they sell at cut rate prices below the minimums established in accordance with the provisions of Section 1.

No contention is made by Schwegmann Brothers that the Louisiana Fair Trade Act is *unconstitutional.* As a matter of fact, its constitutionality and effectiveness against non-contracting retailers have been upheld under Louisiana law in *Pepsodent Co. and International Cellucotton Products Co. vs. Krauss Co.*, 200 La. 959, 9 So. (2d) 303, recently referred to with approval in *Schwegmann Bros. vs. Louisiana Board of Alcoholic Beverage Control*, 216 La. 148, 43 So. (2d) 248. The *Pepsodent* case was followed by the Fifth Circuit Court of Appeals in *Mennen Co. and Bristol-Meyers Co. vs. Krauss Co.*, 134 F. (2d) 348.

In *Old Dearborn Distributing Co. vs. Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, and in *Pep Boys, etc., vs. Pyroil Sales Co., and Kunsman vs. Max Factor & Co.*, 299 U. S. 198, 57 S. Ct. 147, it was held that state fair trade statutes of this kind do not violate the Constitution of the United States. And as stated in the opinion of the Fifth Circuit Court of Appeals in the cases presently under review, "It is

not for one who asserts rights under a state statute to prove as a condition precedent to its enforcement that the legislature had a right to enact it. He may stand upon the presumption of validity until such presumption is overthrown. This is especially so in this case since it is admitted, as indeed it must be, that unless it is prohibited by federal law, the Louisiana Fair Trade law has been already determined to be a valid law in the state of Louisiana binding on consenters and non-consenters alike as a declaration of state fair trade policy which the state is competent to make."

The exhaustive brief filed on behalf of Schwegmann Brothers fails to meet squarely the issue of *whether there has been a violation of the Sherman Act* by Calvert, Seagram or the Louisiana Legislature. On the contrary, Schwegmann Brothers start backwards, with the amendment to the Sherman Act, and argue that if the binding of non-contracting retailers is not expressly authorized by the amendment, then and for that reason the binding of non-contracting retailers is illegal. *For purposes of these cases, this is not so unless the Sherman Act itself makes the binding of non-contracting retailers illegal!*

Calvert and Seagram have entered into contracts *specifically authorized by the Miller-Tydings Amendment to the Sherman Act and by the Louisiana Fair Trade Act.* Have they thereby committed a violation of the Sherman Act, subjecting them to the penalties of a $5,000 fine or imprisonment up to one year, or both? Does the fact that the *Louisiana Legislature*

acted to bind non-contracting retailers make Calvert and Seagram guilty of a criminal offense?

ARGUMENT

1. The Sherman Act is Penal in Nature and Should be Strictly Construed

The Sherman Act is penal in nature, Section 1 thereof providing a penalty of $5,000.00 or one year in jail or both; hence, it is subject to a strict construction. *United States v. Swift, et al.*, 188 Fed. 92; *Toulmin, Anti-Trust Laws of the United States*, Vol. 1, p. 191, Sec. 8.8.

It is stated in the brief filed on behalf of Schwegmann Brothers (p. 28) that "The Court . . . construes the Sherman Act broadly . . .", but no authorities are cited in actual support of this statement. The Sherman Act may be "a great declaration of national policy" and the prohibition of monopolies may represent a broad policy of the Congress, as indicated in the cases cited. But this does not mean that a criminal statute should be broadly construed to bring within its scope acts which are not clearly embraced by its provisions.

In *Northern Securities Co. v. United States*, 193 U. S. 197, 24 S. Ct. 436, this court clearly regarded the Sherman Act as a criminal statute, stating that the rule of strict construction "means only that we must not bring cases within the provisions of such a statute

that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the Legislature, and the duty of the Court is to give effect to that intention as disclosed by the words used". 193 U. S. at p. 358. In his dissenting opinion Mr. Justice Holmes said "The statute of which we have to find the meaning is a criminal statute". 193 U. S. at p. 401.

2. What Does Section One of the Sherman Act Prohibit?

Section 1 of the amended Sherman Act,[1] upon which the position of Schwegmann Brothers rests, prohibits (a) *contracts*, (b) *combinations*, and (c) *conspiracies* in restraint of trade or commerce. However, as amended by the Miller-Tydings Act, this section specifically authorizes contracts or agreements prescribing minimum prices for the resale of commodities bearing the trade mark, brand or name of the producer or distributor, when the commodities in question are in free and open competition with other commodities of the same general class, and when the contracts in question are lawful as applied to intrastate transactions under any statute, law, or public policy in any state, etc., where the resale is to be made. The first sentence of Section 1 reads:

> "Every contract, combination in the form of trust, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

[1] Appendix B.

Since the contracts which Calvert and Seagram made with retailers other than Schwegmann are clearly legal under both state and federal law, Calvert and Seagram are entitled to injunctive relief unless they committed some other specific act which was a violation of the Sherman Act.

The provision by the Louisiana Legislature that non-contracting retailers shall be bound by the fair trade minimum in a valid contract is clearly not a violation of the Sherman Act, for the simple reason that such legislative provision is not a "contract, combination or conspiracy", and is entirely beyond the scope of the Sherman Act.

In *Parker vs. Brown*, 317 U. S. 341, 63 S. C. 307 this Court held that a proration program for marketing raisins, established by a California statute, was not in violation of the Sherman Act. Counsel for Schwegmann Brothers attempt to distinguish this case on the theory that in *Parker vs. Brown* there was *"state action, not action by private individuals"*. However, in the cases presently under consideration Schwegmann was bound not by any action on the part of Calvert or Seagram, but rather by Section 2 of the Louisiana Fair Trade Act. In other words, it was "state action" in the instant cases which bound Schwegmann and not the action of private individuals. Calvert and Seagram, it is true, entered into *legal* fair trade contracts with retailers other than Schwegmann; but they entered into no illegal *contract, combination* or *conspiracy* whatever which bound Schwegmann Brothers.

It has properly been stated that no state can sanction a violation of the Sherman Act through legislation endorsing actions which constitute violations. However, it is obvious that Seagram and Calvert have taken no step violating the Sherman Act, and the action of the Louisiana Legislature does not operate in any way to sanction or attempt to legalize a violation of the Sherman Act.

The following language of this court in *Parker vs. Brown*, is most pertinent (317 U. S. 341, at 350):

> "Section 1 of the Sherman Act, 15 U. S. C. Section 1, makes unlawful 'every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.' And Section 2, 15 U. S. C. Section 2, makes it unlawful to to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.' We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. Occupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. See *Adams Express Co. v. Croninger*, 226 U. S. 491, 505; *Napier v. Atlantic Coast Line*, 272 U. S. 605, 607; *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341;

Illinois Gas Co. v. Public Service Co., 314 U. S. 498, 510.

"But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations (Sec. 7), and it authorizes suits under it by persons and corporations (Sec. 15). A state may maintain a suit for damages under it, *Georgia v. Evans*, 316 U. S. 159, but the United States may not, *United States v. Cooper Corp.*, 312 U. S. 600—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute.

"There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only

'business combinations'. 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 492-93 and n. 15; *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, affirmed 175 U. S. 211; *Standard Oil Co. v. United States*, 221 U. S. 1, 54-58.

"True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*, 193 U. S. 197, 332, 344-47; and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co. v. United States*, 313 U. S. 450. Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the

Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin v. Wallace*, 306 U. S. 1, 16; *Hampton & Co. v. United States*, 276 U. S. 394, 407; *Wickard v. Filburn*, ante, p. 111.

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen v. Smith*, 195 U. S. 332, 344-45; cf. *Lowenstein v. Evans*, 69 F. 908, 910.

It is to be noted that in the dissenting opinion of Judge Russell in the present cases, he concedes that:

> *"Section 2 of the Louisiana statute, upon which the present cause is predicated, is a substantive law of Louisiana, not a contract or agreement."*

In *Northern Securities Co. vs. United States*, 193 U. S. 197, 24 S. Ct. 436, this Court pointed out that the first section of the Sherman Act makes a difference between a contract and a combination or conspiracy in restraint of trade, but:

> *"The words hit two classes of cases and only two—contracts in restraint of trade and combinations or conspiracies in restraint of trade."*

3. Legislative History

The Sherman Act, as amended by the Miller-Tydings Act, is clear and unambiguous and does not prohibit any act performed or any action taken by Seagram or Calvert. But if legislative history is resorted to for the purpose of determining the intention of Congress in adopting the Miller-Tydings Amendment, it will be found that Congress intended to remove every prohibition from the enactment by the States of fair trade laws, binding alike upon signers and non-signers. This question was reviewed exhaustively in *Pepsodent Co. vs. Krauss Co.*, 56 F. Supp. 922 (D. C. La. 1944), by Judge Wayne G. Borah, now a member of the Fifth Circuit Court of Appeals.

Specific and extensive references to the legislative history are made in other briefs in these cases, but the following summary is of assistance in obtaining a comprehensive view of the purpose and intent of the Miller-Tydings amendment (*Toulmin, Anti-Trust Laws of the United States*, Volume 1, (1949)):

p. 233, Sec. 10.2, et seq.:

> "The legislative intent of the Miller-Tydings Act was to remove every obstacle which would hinder the free enforcement by the states of provisions of their local fair trade acts.
>
> "Congress made legal a specific type of contract or agreement—the resale price maintenance contract—which prior to the amendment was illegal in interstate commerce.

"The general purpose of the amendment was to provide for the right of any manufacturer or distributor of a commodity marked with the name, trade mark, brand, or other identification of such producer or distributor, to control the resale price of such goods by an agreement between such producer and his next stage of distribution.

Prior to the enactment of the Miller-Tydings Act, it was illegal for any one to agree with another as to maintenance of a resale price. Under many state laws it was legal to control resale prices as to intrastate commerce, but it was illegal to do the same thing in interstate commerce.

"It should be noted that under the Miller-Tydings Act—

"(1) The commodity must bear the identification (trade mark, brand, or name) of the producer or distributor.

"(2) The commodity must be in free and open competition with commodities of the same general class produced or distributed by others.

"(3) The resale must be in states where resale price maintenance contracts are legal.

"(4) Horizontal agreements are prohibited.

"Prior to the amendment of section 1 of the Sherman Act, contracts fixing resale prices were void and an unfair method of competition.

"The Miller-Tydings Act removed the bar of illegality to the making of minimum resale price maintenance contracts covering commodities sold in interstate commerce if they were to be resold in a state

where such contracts had been legalized with respect to intrastate sales.

"Such laws—laws declaring as not in violation of the law of the particular state certain kinds of resale price maintenance contracts and providing that nonsigners of such contracts with knowledge thereof should be bound by the price stipulations therein—were on the statute books of forty-five states as of May 1, 1941. Missouri, Texas, Vermont, and the District of Columbia do not have a law of this kind.

"The first of such laws was enacted in California in 1931, without inclusion of the nonsigner clause, which was added by amendment in 1933. Similar acts, including the nonsigner provision, were thereafter enacted by other states."

p. 242, Sec. 12.2, et seq.:

"The two proviso clauses were added (to Section 1 of the Sherman Act) by the Miller-Tydings Act of August 17, 1937.

"The general purpose of the amendment was to provide for the right of any manufacturer or distributor of a commodity marked with the name, trade mark, brand or other identification of such producer or distributor to control the resale price of such goods so marked by an agreement entered into between such producer or distributor and his next stage of distribution, that is, with his wholesale or retail dealer.

"Prior to the enactment of the Miller-Tydings Act it was illegal in interstate commerce to agree with another as to the maintenance of the resale price. Under many state laws it was legal to control resale

prices as to intrastate commerce, but it was illegal to do the same thing in interstate commerce.

"A producer or distributor may not agree, however, with his competitors as to resale prices.

"The legislative history of the Miller-Tydings amendment to the Sherman Act discloses congressional intent to remove every obstacle which would hinder free enforcement by the States of provisions of their local fair trade Acts in such fashion as their respective Legislatures see fit."

4. The Wisdom of Fair Trade

There are many sound and compelling reasons why fair trade laws are desirable. But assuming that there are persuasive arguments to the contrary, the *wisdom* of the policy authorizing fair trade is not at issue, as Congress and forty-five states, including Louisiana, have expressly sanctioned fair trade minimum prices.

In the brief filed on behalf of Schwegmann Brothers counsel concede (p. 29):

> *"In construing the law in this case, petitioners do not ask the Court to pass on the wisdom of the law."*

But a very substantial portion of their brief is apparently devoted to an effort to show that if fair trade is permitted to survive, the entire economic structure of the United States will crumble.

In *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 US 183, 57 S. Ct. 139, this Court maintained the validity of the Illinois Fair Trade Act in proceedings against a non-contracting retailer. No violation of the Sherman Act was urged in that case, but since the Illinois statute and the Louisiana statute presently under consideration are virtually identical, the court's analysis of the Fair Trade Act is pertinent (299 US at 188 et seq.):

> "Section 1 affirms the validity of contracts of sale or resale of commodities identified by the trade-mark, brand or name of the producer or owner, which are in fair and open competition with commodities of the same general class produced by others, notwithstanding that such contracts stipulate (1) that the buyer will not resell except at the price stipulated by the vendor; and (2) that the producer or vendee of such a commodity shall require, upon the sale to another, that he agree in turn not to resell except at the price stipulated by such producer or vendee. It is clear that this section does not attempt to fix prices, nor does it delegate such power to private persons. It *permits* the designated private persons to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see . . . Thus far, the act plainly is not open to objection; and none seems to be made.
>
> "The challenge is directed against section 2, which provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any

contract made under Section 1, whether the person doing so is or is not a party to the contract, shall constitute unfair competition, giving rise to a right of action in favor of anyone damaged thereby.

"It is first to be observed that Section 2 reaches not the *mere* advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wilfully and knowingly*. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it.

"In the second place, Section 2 does not deal with the restriction upon the sale of the commodity qua commodity, but with that restriction because the commodity is identified by the trademark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property —namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.

"Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course,

with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under Section 2 of the law by which such acquisition was conditioned. *Cf. Provident Inst. for Savings v. Jersey City*, 113 U. S. 506, 514, 515, 28 L. ed. 1102, 1105, 1106, 5 S. Ct. 612; *Vreeland v. O'Neil*, 36 N. J. Eq. 399, 402, same case on appeal, 37 N. J. Eq. 574, 577."

* * * * * * * * *

"Nor is Section 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process. We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will. It is well settled that the proprietor of the good will is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and

authority.' *McLean v. Fleming*, 96 U. S. 245, 252, 24 L. ed. 828, 831. 'Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it.' *Hanover Star Mill. Co. v. Metcalf*, 240 U. S. 403, 412, 60 L. ed. 713, 717, 36 S. Ct. 357. The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Sec. 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.' See *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Asso.* 276 U. S. 71, 91, 92, 96, 97, 72 L. ed. 473, 480-483, 48 S. Ct. 291. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity,—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods,

but injurious to the general public as well. The evidence to that effect is voluminous, but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned."

In *Ely Lilly & Co. vs. L. S. Saunders*, 216 N. C. 163, 4 SE (2d) 528, 125 A. L. R. 1308, the Supreme Court of North Carolina, in an unusually well considered and exhaustive opinion, held that the North Carolina Fair Trade Act was valid and enforceable, as to both contracting and non-contracting retailers. The following language from that opinion is pertinent: (125 A. L. R. at 1316 et seq.):

"The agreements authorized by the law are vertical, between manufacturers or producers of the particular branded commodity and those handling the product in a straight line down to and including the retailer; not horizontal, as between producers and wholesalers or persons and concerns in competition with each other in dealing with like comodities. The law does not authorize cross agreements between competitors. Whatever agreements are permitted, all face one way; they apply only to commodities produced by the

manufacturer, bearing his trade-mark, brand, or name, and then only if they are in free and open competition with commodities of the same general class produced or distributed by others. The incidence of the law on trade, therefore, affects only that portion of the commodity in which the producer has already a lawful monopoly of ownership, and which goes into distribution in a volume which may be fairly measured by the popularity which the good will and identifying name have achieved, but which can never amount to the whole. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra; Joseph Triner Corp. v. McNeil,* 363 Ill. 559, 2 NE (2d) 929, 104 ALR 1435; *Max Factor & Co. v. Kunsman, supra.*"

* * * * * * * *

"It is not conceivable how any horizontal restriction of trade can be effected through the provisions of the statute. The restraint intended does not apply to the commodity, in its generic sense, upon which the manufacturer has expended his care and skill—it is the commodity plus the brand which identifies it, guarantees its quality, and is symbolic of the good will which rightfully belongs to the manufacturer. It is this alone which the statute desires to protect, and to the piratical use of which it applies restraint. As stated by Justice Sutherland in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra* (299 US 183, 57 S. Ct. 145, 81 L. ed. 109, 106 ALR 1476): 'The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodi-

ty bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates "unfair competition." See *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n*, 276 US 71, 91, 92, 96, 97, 48 S. Ct. 291, 295, 296, 297, 72 L. ed. 473. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to the end.'".

"The common law emphasis on forestalling 'regrating, engrossing and conspiracy to raise prices must not lead us to infer that the sole objective of public policy was to obtain the lowest possible price to the consumer on every commodity. This is both an economic fallacy and a misconception of law. The public is more interested in fair and reasonable prices which preserve the economic balance in advantages to all those engaged in the trade, with due regard to the consuming public, than it is in securing the lowest obtainable prices, when the inevitable tendency is to degrade or drive from the market 'articles which it is assumed to be desirable that the public should be able to get' (Justice Holmes, dissenting, in the Dr. Miles case).

On this phase of the subject the Supreme Court of the State of Washington in *Fisher Flour Milling Co. v. Swanson*, 76 Wash. 649, 137 P. 144, 151, 51 LRA (NS) 522, observed: 'Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles. . . . Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence.' Our own laws implementing this section of the Constitution recognize that price-cutting, not born of fair or normal competition, may indeed be piratical, and a dangerous step toward monopoly. C. S. Chap. 53, sec. 2563; *State v. Atlantic Ice & Coal Co.*, 210 NC 742, 188 SE 412."

* * * * * * * *

"Perhaps the most direct answer to the charge of monopoly made against this statute is contained in the provisions of the statute itself, under which it automatically ceases to operate where there is no competition. In a late case, *Goldsmith v. Johnson & Co.*, 7 A (2d) 176, Maryland Court of Appeals, June 28, 1939, decided since the case at bar was argued before this Court, this was thought to be a sufficient answer, and with this we agree."

* * * * * * * *

"The resale price is not fixed on any commodity, as such, and with respect to these the traditional

rules demanding freedom of trade remain uninvaded. It is placed only on the branded commodity; and this court, with the great majority of those which have preceded us in passing on similar laws, is of the considered opinion that the distinction is valid. Fixing the price, usually the most important incident of bargaining, and still so when the parties are equally related to the subject of the transaction is, in this instance, merely ancillary to the purpose of the law, which is to protect both the producer and the public —the one with respect to his good will, the other with respect to the quality and integrity of a desirable product. The restriction is imposed, as we have said, more with respect to the good will and brand than to the limited quantity of product, as such, which passes in the sale. A frank recognition of their relative importance demands that the minor consideration should give way, *ut res magis non pereat*. Laws protecting trademarks, trade-names and brands from piracy are of no avail whatever when the abuse of them by a purchaser of branded products is uncontrolled. The producer is less hurt by pilfering than he is by sabotage.

"'There is nothing sacrosanct about price.' The right of the owner to fix a price on any commodity he sells is not absolute. To illustrate, if that were true the second Section of the Robinson-Patman Amendment, standardizing prices by prohibiting discriminations, would array that Act against both the Fifth and the Fourteenth Amendments of the Federal Constitution. It is a right created by law and subject to control by law when necessary to the just and orderly administration of government with due regard to constitutional guaranties. Price restrictions stand upon the same challenge before the law as any

other restraint upon the use of property, and are concerned with the same constitutional provisions."

* * * * * * * *

"In our opening analysis we stress the fact that the producer and seller of a branded commodity, along with the commodity itself, transfers the use of the good will, which use is made effectual by the use of the distinguishing brand or trade-mark. The quantity of commodity corporeally passed by the sale is always a relatively unimportant item, but the entire good will of the producer's business, with all of its force and effectiveness, is put behind the product in the hands of the retailer for use in inducing consumer purchase; and, conversely, the entire good will may be appropriated and prostituted by the cut rate dealer who uses it, not to promote the sale of the branded commodity, but to increase his sale in other commodities. In either case the entire good will is involved, and in a very real, if not technical, sense subjected to a servitude. On this principle there is no sound reason why, under favoring legislation, the parties should not be permitted to bargain with reference to the conditions upon which this servitude may be imposed, and none why this may not take the form of an agreement as to the resale price, the maintenance of which is to their mutual advantage. Some of the decisions find support for the provisions similar to those contained in Section Six in the principle that outside interference with such a contract is a proper subject for statutory prohibition, since, in somewhat similar circumstances, the court itself has afforded relief.

"In *Port Chester Wine & Liquor Shop, Inc. v. Miller Bros., Fruiterers, Inc.*, 253 App. Div. 188, 1 NYS (2d)

802, decided by the Appellate Division of the New York Supreme Court on 28 January, 1938, an action by a retail dealer against another retailer cutting resale prices was sustained under a similar act. Without deciding that particular question here, the situation is at least illustrative of the soundness of the law, and we may infer from the agreed facts here that a similar situation may exist among retailers who have complained to the plaintiff of the prevalence of this practice and threatened to discontinue handling the brands."

* * * * * * * * *

"Nor is relevant the fact that prices on commodities described under Class III, which have been fixed by competing distributors, are within one cent of parity. In the absence of agreement to that effect this has not been considered by this court as sufficient even to support a charge of violating the Anti-Monopoly Statute C. S. Sec. 2559 et seq. *State v. Standard Oil Co. of New Jersey*, 205 NC 123, 126, 170 SE 134, and the Supreme Court of the United States is in accord. *United States v. American Tobacco Co.*, supra. This might occur through an unlawful agreement, certainly, if at all, dehors the operation of this law, or it might be the result of close competition as is now the case with the price of gasoline by the major oil companies, or it might be a case of 'follow the leader,' and it is not a violation of any law to copy the prices of a competitor.

"We have nothing to do with the expediency of an economic experiment. Discussions of this subject, on which thousands of articles have been written and hundreds of arguments made, has left the law-making bodies and most of courts convinced that

there is a field here in which the protection of private right and the promotion of the public welfare are not in irreconcilable conflict. The statute represents an attempt of the General Assembly to harmonize and apply these principles. In our opinion the provisions of the Constitution called to our attention do not defeat that legislative power. The propriety of its exercise is within the legislative discretion.

"We conclude therefore, that the statute under review is a constitutional and valid expression of the legislative will, and as such must be enforced."

5. Constitutionality of Louisiana Fair Trade Act Is Not at Issue

The constitutionality of the Louisiana Fair Trade Act, and particularly Section 2 thereof, is not at issue.

Perhaps Schwegmann Brothers could have taken the position in the District Court that any attempt on the part of the Louisiana Legislature to provide that non-contracting retailers should be bound was unconstitutional with respect to interstate transactions. It may be assumed that no plea of unconstitutionality has been raised for the simple reason that this court and the Louisiana Supreme Court and numerous other courts have frequently held that fair trade statutes are constitutional. In any event, no attack on constitutional grounds was made in the District Court; nor was it made before the Court of Appeals for the Fifth Circuit; nor is it made at the present time; nor can it be made now for the first time.

On page 22 of the brief filed on behalf of Schwegmann Brothers it is stated that, as to interstate commerce, Congress has occupied the legislative field and has barred the door to inconsistent state legislature, except as expressly authorized by the Miller-Tydings Act. This contention ignores the fact that the Miller-Tydings Amendment specifically legalizes the designated fair trade contracts when authorized by state statutes. Moreover, the Miller-Tydings Amendment certainly does not limit the validity of fair trade contracts to contracting parties only. As pointed out in the opinion rendered by the Fifth Circuit Court of Appeals in these cases, the Miller-Tydings Amendment "neither authorizes nor prohibits state legislation".

Substantial sections of the brief filed on behalf of Schwegmann Brothers are devoted to quotations from and references to legal periodicals, Fortune magazine, and the position of the Federal Trade Commission on the subject of whether or not Fair Trade is *desirable*. As pointed out by this Court in the *Old Dearborn* case, much can be said on both sides of this question. But this is not the present issue. When Congress approved fair trade authorized by local statutes or public policy, Congress expressed itself on the subject; and the fact that a writer for Fortune magazine disagrees with Congress as to the desirability of fair trade is not controlling. Congress spoke originally by enacting the Sherman Act, making contracts, combinations and conspiracies in restraint of trade or commerce illegal; but Congress subsequently enacted the Miller-Tyd-

ings amendment expressly excluding fair trade from the prohibitions of the Sherman Act, provided local statutes or public policy permitted fair trade.

Forty-five states have stated legislatively that their public policy permits fair trade, and the language of these statutes closely follows the language of the Miller-Tydings amendment. Again, the fact that the writers for Fortune magazine or certain legal periodicals may disagree with the legislatures of forty-five states does not control in determining whether or not fair trade is legal.

We reiterate that *the basic issue is not what is permitted by the Miller-Tydings Amendment, but rather what is prohibited by the Sherman Act.*

The Sherman Act was not designed to and did not provide that it is illegal for a state legislature to adopt a statute preventing non-contracting retailers from engaging in cut-throat price cutting of commodities bearing trade marks or trade names and protected by the fair trade laws approved by both Congress and the state legislature itself.

Seagram and Calvert entered into fair trade contracts with retailers other than Schwegmann Brothers, and these contracts were *expressly* and *admittedly* authorized by the Miller-Tydings Amendment and Section 1 of the Louisiana Fair Trade Act. *Did this make them guilty of a violation of the Sherman Act, punishable by the harsh penalties of a penal statute?*

Section 2 of the Louisiana Fair Trade Act provides as follows:

> "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Did the enactment of this statute by the Louisiana Legislature make Calvert and Seagram guilty of a criminal act punishable by a fine of $5,000.00 or imprisonment for one year, or both?

CONCLUSION

This brief is filed on behalf of the pharmacists and assistant pharmacists of Louisiana, and their friends and associates. They are typical of the men and women throughout the United States who operate small businesses to earn a living. They are vitally interested in the outcome of this litigation because they realize that if fair trade is not sustained, they will fall easy prey to powerful predators who will pounce upon the opportunity to kill their means of livelihood.

No item can be fair traded unless it is in free and open competition with other commodities of the same class, produced by other manufacturers. This factor alone preserves the fair competition which protects the pub-

lic. No manufacturer is bound to fair trade his products and no manufacturer is bound by the fair trade price established by another manufacturer. If a fair trade price is too high, the competing producers are free to capture the market by establishing lower fair trade prices or none at all.

The cut-throat pirate who sells below the level of a reasonable profit does so to kill his competition. He usually does so either because he has tremendous size and purchasing power approaching monopoly, or because by selling certain articles at cut-throat prices he can deceive the public into believing that he sells all other items for less than reasonable prices.

However, apart from the desirability of fair trade or the undesirability of cut-throat competition are the issues involved in the cases presently under consideration. The sole issue before the Court is whether Seagram and Calvert have violated the Sherman Act, and it is clear that they have not. No issue involving the constitutionality of the Louisiana statute is before the Court.

It is respectfully submitted that the judgment of the Court below should be affirmed.

C. ELLIS HENICAN,
PHILIP E. JAMES,
MURRAY F. CLEVELAND,
Attorneys for Louisiana State Pharmaceutical Association, *Amicus Curiae.*

CERTIFICATE

This is to certify that copies of this brief have been served on Counsel for Petitioner and Counsel for Respondents on this the 31st day of March, 1951.

.....

APPENDIX A

Louisiana Fair Trade Act

AN ACT

To protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. The following terms, as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

Section 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Section 6. This Act may be known and cited as "Fair Trade Act." Approved by the Governor: June 26, 1936.

APPENDIX B

Section 1 of Sherman Anti-Trust Act, as amended by Miller-Tydings Act

(The provisions of the Miller-Tydings Amendment are italicized)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; *Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity*

herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any such contract or engage in any such combination or conspiracy *hereby declared to be illegal* shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

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IN THE

Supreme Court of the United States

October Term, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioners,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

AND

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioners,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

RESPONDENTS' PETITION FOR REHEARING

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RESPONDENTS' PETITION FOR REHEARING

Calvert Distillers Corporation and Seagram-Distillers Corporation respectfully pray that the Court grant a rehearing of its judgment entered on May 21, 1941 in the above entitled and numbered cases, on the following grounds, to-wit:

(1) The Court in arriving at its decision in this case gave insufficient consideration to the fact that the requirement that non-signers comply with minimum prices established by fair trade contracts is imposed by State law rather than by contract of private parties.

The only action taken by the respondents in the instant case was the execution of fair trade contracts clearly and definitely legalized by the Miller-Tydings Amendment. There is not one scintilla of evidence in the record which shows that the respondents entered into any combination or conspiracy with anyone. The respondents did not conspire with Schwegmann Brothers and the only other action taken was the application for an injunction to the United States District Court. It was not any combination or conspiracy between respondents and anyone else which required petitioner to comply with minimum retail resale prices established under the authorized fair trade agreements. It was action of the State in creating the tort of unfair competition for failure of non-signers of fair trade agreements to comply with the stipulated prices which required petitioner to comply.

Had Congress inserted in the Miller-Tydings Amendment an affirmative provision with respect to State law regarding non-signers it would have established the principle that the Sherman Act was applicable to state action as well as to the action of private parties.

However, in *Parker* v. *Brown*, 317 U. S. 341 (1943), this Court held that the Sherman Act did not restrain state action.[1] The statement in the opinion of the Court

[1] At page 351 of *Parker* v. *Brown*, the Court stated:

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. * * * There is no suggestion of a purpose to restrain state action in the Act's legislative histor-

that if Congress had intended to validate the non-signer clauses of state fair trade acts, a non-signer provision would have been included in the Miller-Tydings Act, runs, we submit, directly contrary to the holding of this Court in *Parker* v. *Brown, supra.* If Congress had enacted the Miller-Tydings Amendment with a clause permitting states to require non-signers to comply with minimum prices established by fair trade contracts, it would have been inferrable therefrom that the Sherman Act was otherwise applicable to state action whenever an express exception in favor of state action was not made. Congress was unwilling to establish that principle. But the Court has, by its decision in this case, now done so. This holding may well lead to a result which this Court did not contemplate with respect to the exercise of State power, and we submit that it should be carefully reconsidered by the Court before being allowed to stand as a final determination.

(2) The Miller-Tydings Amendment has for fourteen years been universally and officially construed to leave fully effective the Fair Trade Acts of the States, including the provisions of those acts making Fair Trade contracts binding upon non-signers. The Court's opinion strikes down the policy of the States and declares that Congress did not intend by the Miller-Tydings Amendment to validate those acts as to transactions affecting interstate commerce.

(3) In reaching this result the Court in effect contradicts the rule which it has heretofore laid down that a statute should not be construed so as to make it futile and ineffective. See *Bird* v. *United States*, 187 U. S. 118, 124 (1902); *Armstrong* v. *Nu-Enamel Corp.*, 305 U. S. 315, 332, 333 (1938); *United States* v. *Powers*, 307 U. S. 214, 217 (1939); *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 392 (1950); *Gemsco, Inc.* v. *Walling*, 324 U. S. 244,

258 (1945). The Court adds to the confusion of the profession when it ignores and departs from rules which it has previously enunciated.

(4) That the construction of the Miller-Tydings Amendment which the Court now adopts will make that statute ineffective by striking down the State Fair Trade Acts in the field of interstate commerce (the only field in which congressional action was required) has been admitted by every writer on the subject and by the petitioners themselves, who said in their brief in the Court of Appeals:

> "It should be pointed out that a decision favorable to appellants will cripple, if it will not kill the Miller-Tydings Act. If the Miller-Tydings Act is limited, as the act itself says, to validating fair trade contracts but has no application to price-fixing imposed upon noncontracting parties, fair trade statutes will be deprived of effectiveness in transactions affecting interstate commerce. * * *"

See also 47 Michigan Law Review, 821; 829; 16 New York University Law Quarterly Review, 116, 117; 10 University of Pittsburgh Law Review, 443, 453; 51 Harvard Law Review 336, 344.

(5) One of the reasons assigned by the Court for its conclusion is that the enforcement of the State Fair Trade Acts against non-signers would conflict with the proviso in the Miller-Tydings Amendment prohibiting so-called "horizontal" price fixing. The argument cannot be supported. The proviso of the Amendment prohibits price-making agreements

> "* * * between manufacturers, or between producers, or between wholesalers * * * or between retailers, or between persons, firms and corporations in competition with each other. 15 USC, §1."

The Louisiana Fair Trade Act expressly provides that it shall not apply

> "to any contract or agreement between producers, or between wholesalers, or between retailers, as to sale or resale prices."

The suggestion in the opinion that the enforcement of resale price maintenance against non-signers violates "the spirit of the proviso which forbids 'horizontal' price-fixing" is an obvious *non sequitur*. The conclusive demonstration that there is no clash between these two facets of resale price maintenance law is that State Fair Trade Acts generally contain both a non-signer provision and a prohibition of "horizontal" price fixing agreements.

No non-signing retailer makes any agreement. The penalty imposed by the Fair Trade Acts upon non-signers does not result from any agreement between retailers. There is no fair basis for the statement that if the Court's construction of the Amendment is not adopted "the exception swallows the proviso and destroys its practical effectiveness", since the proviso remains fully effective to prohibit all agreements between retailers, as well as between the other classes of persons referred to. Forty-five State legislatures have been of the opinion that this exception was sufficient for the protection of the public interest involved and it is completely unreasonable to impute to Congress an intention to strike down the results provided by the State laws.

(6) The Court's opinion, while purporting to find support for its conclusion in the history of the Miller-Tydings Amendment, completely ignores the most important item in that history. This is the communication addressed to the President of the United States by the Chairman of the Federal Trade Commission and transmitted by the Presi-

dent as an official document to the Senate at the time that the Miller-Tydings Amendment was under consideration. In that communication the Chairman of the Federal Trade Commission urged Congress *not* to adopt the Amendment because "it would modify the anti-trust laws in differing degrees in different States" by leaving the field of resale price maintenance to be governed by State acts. In this communication the Chairman specially adverted to what he described as a "peculiar feature" of many of the State laws in that "they require wholesalers and retailers to conform to the provisions of private resale maintenance contracts to which they are not parties." The Chairman stated that the enactment of the Miller-Tydings Amendment would make these provisions binding upon interstate commerce and thus a private contract would be "made binding upon *all* dealers and the consuming public."

The President himself in his letter transmitting these observations quoted the language of the Chairman of the Federal Trade Commission, which referred to the probability that manufacturers and retailers might abuse the power to arbitrarily fix retail prices, and thereby cause resentment on the part of the consuming public during a period of rising prices.[2] The opinion of this Court makes

[2] This Court has, of course, no concern with economic questions and we have, therefore, abstained from discussing them, notwithstanding a general feeling at the Bar that these considerations do subconsciously affect the Court. We think it proper, however, to point out that forty-five State legislatures have thought that the public interest justifies the non-signer provisions of the Fair Trade Acts, notwithstanding the contention that they result in higher prices to the consumer. Some considerations may be more important than slightly higher prices to the consumer, even if such prices could be demonstrated to result in the long run, which is a matter of controversy. What reasonable basis is there to suppose that the members of Congress, which is made up of the same sort of persons who make up the State legislatures, would have any different view as to the desirability of the non-signer provisions than the members of the legislatures?

no reference whatsoever to the communication of the Federal Trade Commission. The Court apparently concludes that Congress ignored the communication and that it received no attention whatsoever. Such a conclusion would be difficult under any circumstances to maintain. But in order to maintain it the Court has also to ignore the express references which were made to this letter in the minority report of the Senate Committee, as well as in the debates upon the floor of the Senate.

The opinion of the Court also completely ignores the repeated references in the reports and debates to the decision of this Court in the *Old Dearborn* case (299 U. S. 183), in which the non-signer provisions were fully discussed and maintained as valid under the Fourteenth Amendment.

How could anyone reading these references to the communication of the Federal Trade Commission and the references to the decision of this Court in the *Old Dearborn* case have the slightest basis in reason for the conclusion that Congress did not well understand when it adopted the Miller-Tydings Amendment, that its effect would be to validate in interstate commerce the non-signer provisions of the State Fair Trade Acts?

The opinion of the Court ignores its own prior ruling that decisions of this Court called to the attention of Congress during the progress of a legislative proposal have a significant bearing upon the interpretation of the resulting enactment; see *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 131, 132 (1943).

(7) The opinion of the Court also ignores the statement of Senator Tydings that the purpose of the Amendment was

> "to do what forty-two States have already written on their statute books. It is simply to back up those acts. That is all. * * *"

The Court now defeats the purpose thus expressed. The Court now declares that Congress failed to "back up" the State Acts and that Congress intended on the contrary to leave the State acts ineffective in all transactions affecting interstate commerce.

(8) The Court's opinion denies any weight whatsoever to the repeated assertions of Senator King on the floor of the Senate and in the minority committee report that the Miller-Tydings Amendment would have the very effect which this Court now says Congress did not intend it to have. The opinion brushes aside these assertions of Senator King as "fears and doubts of the opposition". No significance is given to the fact that neither Senator Tydings nor any other participant in the debate challenged the correctness of Senator King's assertion as to the scope and effect of the legislation. Thus, again the Court denies its own prior ruling that effect is to be given to a failure to challenge an assertion by a committee member; see *C. M. St. P. & P. R. R. Co.* v. *Acme Fast Freight*, 336 U. S. 465, 475 (1949).

(9) The Court brushes aside House Report 382, 75th Congress, 1st Session, and the statement by Representative Dirksen as a member of the Conference Committee on H. R. 7472 by merely saying "but we do not take these remarks at face value". The Court endeavors to find support for this position by the circumstance that H. R. Rep. 382 was made upon a bill which departed from the language of the Miller-Tydings Amendment in that it contained a reference to "other conditions". The omission of this reference in the Miller-Tydings Amendment was clearly without significance. As Judge Borah said in *Pepsodent Co.* v. *Krauss Co.*, 56 F. Supp. 926, 927:

"Since the present controversy relates wholly to prices, the omission of the words 'other conditions' from the measure as finally enacted could not possibly have a bearing upon the present issue."

The opinion of the Court does not undertake to meet the observation, merely saying that the circumstance "stirs a doubt" without assigning any substantial reason for doubt.[3]

That Congress understood the Miller-Tydings Amendment to be identical in substance insofar as the point here involved is concerned, with H. R. 1611, to which H. R. Rep. 382 was addressed, is shown by the fact that the Senate Committee Report on H. R. 7472 recites that the portion of that bill which became the Miller-Tydings Amendment *"incorporates the provisions of S. 100."*[4] S. 100 was identical with H. R. 1611, with which H. R. Rep. 382 dealt. ***Thus the Miller-Tydings Amendment was presented to Congress as the same legislative proposal which had been previously embodied in H. R. 1611, which was the subject of H. R. Rep. 382.***

It is not a proper exercise of the judicial function to lay aside legislative material on the theory that the members of Congress did not know what they were talking or thinking about, when they said that the Miller-Tydings Amendment was identical with H. R. 1611 and S. 100. The refusal by the Court to take the remarks contained in H. R. Rep. 382 at their full value because of the Court's doubt as to the identity between H. R. 1611, to which the Committee's report was addressed, and Title VIII of

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[3] Room for doubt is no guide in the interpretation of the statutes; as this Court said in *Trailmobile Co.* v. *Whirls*, "the interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." (331 U. S. 40, 61)

[4] S. Rep. 879, Part 1, p. 5, 75th Cong., 1st Sess.

H. R. 7472, which became the Miller-Tydings Amendment, is equivalent to undertaking to reconstruct the mental processes of the Representatives who were speaking so as to inject into them doubts which there is no basis for thinking that the speakers actually entertained and which indeed are proven not to have been entertained by the statements made in the Committee report as to the identity of the bills.

The Court not only refuses to give weight to H. R. Rep. 382, but it also denies any effect to the statement of Representative Dirksen, a House Conferee on the Miller-Tydings Amendment, who reported the results of the conferences on that Amendment, in the final stage of its legislative history. Yet Representative Dirksen's statement itself identifies the Miller-Tydings Amendment with H. R. 1611 and the reasons which he gave in support of the Miller-Tydings Amendment completely negative any inference to be drawn from the omission of the words "or other conditions."[5]

The dropping of the words "or other conditions", when this Committee incorporated this legislative proposal in H. R. 7472 as Title VIII, obviously did not implant in the mind of Senator King (a member of the Committee and an opponent of the legislative proposal) any such "doubt" as is expressed in the opinion. He proceeded with his vigorous opposition to the legislative proposal, primarily on the reiterated assertion that it meant resale price maintenance enforcement against non-signers.[6] It is beyond dispute that the House debate on the final passage of Title VIII of H. R. 7472 is part and parcel of the legislative history of the Miller-Tydings Amendment, and a judicial

[5] 81 Cong. Rec. 8138.

[6] S. Rep. No. 879, Part 2, p. 6, 75th Cong., 1st Sess.; 81 Cong. Rec. 7490-7492.

determination otherwise is as unwarranted as would be an attempt to revise and rewrite the Congressional Record itself.

The same comments also apply to the progress of Title VIII of H. R. 7472 through the Senate after the favorable Committee report. This period, undoubtedly a part of the history of this legislation in its final form, includes the minority report of Senator King[7] and his opposing argument on the Senate floor,[8] both expressing at length his unchallenged and uncontradicted assertions that the proposed legislation would make resale price maintenance enforcible against non-signers under State Fair Trade Acts.[9] When all the Senate and House material on final passage of Title VIII of H. R. 7472 is read and considered together,[10] a clear case is obviously made of a "common agreement upon the general purposes"[11] of the Miller-Tydings Amendment, to turn the subject over to the States and to "back up" and make fully enforcible the laws which they had enacted.

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[7] S. Rep. No. 879, Part 2, 75th Cong., 1st Sess.

[8] 81 Cong. Rec. 7490-7493.

[9] On page 5 of its opinion the Court refers to the effect of the non-signer provisions in cases where a distributor executes a contract with a single retailer. This is the same argument which Senator King specifically used in his minority report and again in his argument on the Senate floor against the Miller-Tydings Amendment. The Senate rejected Senator King's argument. This Court now adopts the argument and makes its view prevail over that of the majority of Congress. See 81 Cong. Rec. 7491 and Senate Report 879, Part 2, page 6, 75th Cong., 1st Sess.

[10] and laying aside all prior legislative material on grounds of "doubt" as to its pertinency to the final enactment.

[11] *United States* v. *San Francisco*, 310 U. S. 16 (1940), footnote 10, page 22.

(10) The Court attributes the absence of any specific reference to non-signer provisions in the Miller-Tydings Amendment to a desire to follow the provisions of the Kelly-Capper bill which had failed to carry in the preceding session of Congress. The argument ignores the fundamental difference between the character of the Kelly-Capper bill and that of the Miller-Tydings Amendment. The Kelly-Capper bill proposed a uniform *federal* rule of substantive law. If such a rule had been adopted express non-signer provisions would have been required since without them in a uniform federal law no basis would have existed to make resale price maintenance obligatory against non-signers in transactions affecting interstate commerce. But the Miller-Tydings Amendment took an entirely different approach. As Senator Tydings declared, it did not set up any uniform federal rule, not even one enforcible against actual signers. It was solely an *enabling act* and its obvious purpose, both on its face and as demonstrated by its legislative history, was to leave to the states the sole subject of resale price maintenance on identified commodities in fair and open competition with commodities of the same general class produced by others. In such an enabling act which validated State Acts no references to the possibly varying provisions of State Acts as to signers or non-signers were required or, indeed, appropriate.

(11) The opinion is clearly erroneous in reciting that the Louisiana Fair Trade Act sanctions the fixing of maximum as well as minimum prices. The statement to this effect in the opinion is directly in the teeth of the decision of the Supreme Court of Louisiana in *Pepsodent Co.* v. *Krauss Co.*, 209 La. 959, 967-8.

(12) The opinion quotes at page 10 the reference in the Senate Report on H. R. 7472 to the "permissive" nature of the State Laws. This characterization was used by the Supreme Court of Wisconsin in upholding the Fair Trade Act of that State, which contained non-signer provisions. See *Weco Products Company* v. *Reed Drug Company,* 225 Wis. 474, 486, 487. It is correctly used since the Fair Trade Acts do not compel a manufacturer to establish a resale price and the case is not one of compulsory price fixing.

(13) The opinion of the Court entirely ignores the official construction of the statute evidenced by the action of the Federal Trade Commission in dismissing the complaints which prior to the enactment of the Amendment it had caused to be instituted against these respondents on the theory it was an unfair trade practice to enforce resale price maintenance. See cases reported 27 F. T. C. 106, 123, 145, 162 and 186, against these respondents and others. Compare 39 F. T. C. 154. Nor does the Court refer to the official statement of the Assistant Attorney General in charge of anti-trust prosecution that the Miller-Tydings Amendment applied to non-signers.

(14) The suggestion in the concurring opinion that legislative history should not be resorted to because the materials of legislative history are not available to the average lawyer is without force under modern conditions. There is little purpose in recording Committee reports and Congressional debates if use cannot be made of them in construing the statutes. Every lawyer having occasion to deal with the federal statutes today must necessarily refer to this material wherever there is any room for argument. Photostats and other copies of the material

are readily obtained and the official material is to be found in libraries which are the accredited depositaries of Congressional material throughout the country.

(15) Congress assumed no "devious route" in adopting the Miller-Tydings Amendment nor did it fail to make its purpose plain. That purpose was to validate in the field of interstate commerce the provisions of State Acts which had received legislative approval in forty-two states. For fourteen years since the adoption of the Miller-Tydings Amendment no one in official position and no one in business life has had any doubt as to what Congress intended to do. . . .

Respectfully submitted,

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Certificate of Counsel

The foregoing Petition for Rehearing is believed to be meritorious and is presented in good faith and not for delay.

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